Dispute Resolution Under the Kyoto Protocol

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The Kyoto Protocol is designed to reduce greenhouse gas emissions, while allowing Parties to implement trading mechanisms to achieve such reductions. A compliance regime is necessary for the success of the Protocol. Given the Protocol’s complexity and expected participation by non-state actors, any dispute settlement mechanism designed for such a compliance system must be flexible and provide predictability to its participants. This Article draws on existing dispute settlement models to recommend a suitable settlement mechanism. It suggests a three-tiered dispute settlement system combining aspects of an enforceable dispute resolution process, strong sanctions for noncompliance, and opportunities for arbitrating disputes that arise between private entities.

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INTRODUCTION

Noncompliance and dispute resolution procedures help ensure stability with respect to international regimes, and successful dispute resolution is crucial for the fulfillment of the regime’s objectives. The Kyoto Protocol (Protocol) to the
Framework Convention on Climate Change (FCCC)\(^1\) presents special challenges in designing and implementing a dispute settlement mechanism. For the first time under an international environmental treaty, the private sector and non-governmental organizations (NGOs) are expected to play a crucial role, together with nation states, in fulfilling the Protocol's objectives. For example, the Protocol expressly contemplates private sector investment in clean development mechanism (CDM) projects.\(^2\) NGOs could also be actively involved in information gathering, monitoring, verifying, and perhaps organizing their own portfolios for CDM investments.\(^3\) From a private investor's viewpoint, any dispute settlement procedure will need to provide effective redress and enough legal certainty to encourage investment. For NGOs, certainly in their oversight function, the ability to raise environmental and developmental concerns before a dispute settlement body is likely to be of great importance. Since noncompliance with the Protocol's environmental protection objectives affects the international community without injuring one state specifically, a question arises as to whether international organizations should be allowed to bring claims on behalf of the community.

Part I of this Article provides a brief overview of two of the flexible trading regimes envisioned under the Protocol, namely, Annex I emissions trading pursuant to Article 17 of the FCCC and the CDM established under Article 12.\(^4\) Part II examines current dispute settlement mechanisms established under international treaties such as the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), the United Nations Convention on the Law of the Sea (UNCLOS), and the International Centre for the Settlement of Investment Disputes (ICSID). Part III summarizes

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1. Given the ubiquitous presence of acronyms in discussions such as these, an acronym guide can be found as an appendix to this Article.

2. Article 12.9 of the Kyoto Protocol reads: "Participation under the clean development mechanism, including in activities mentioned in paragraph 3(a) above and in the acquisition of certified emission reductions, may involve private and/or public entities, and is to be subject to whatever guidance may be provided by the executive board of the clean development mechanism." Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, art. 12, 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol].

3. NGOs could be subsumed under the heading of public entities investors under Article 12.7. See Kyoto Protocol, supra note 2, art. 12.7.

4. A discussion of Annex I joint implementation and emissions reduction credit systems are beyond the scope of this Article.
potential disputes that may arise under the Protocol's trading regimes and suggests the most appropriate methods of dispute resolution according to the participants and each potential type of dispute. Finally, Part IV outlines lessons learned from experience with the dispute settlement mechanisms discussed in Part II and integrates positive aspects that might be gleaned from them in eventual design of the Protocol's dispute settlement mechanism.

OVERVIEW OF TRADING REGIMES

Two flexible trading mechanisms adopted under the Kyoto Protocol are known as emissions trading and the CDM. Emissions trading, as established under Article 17 of the Protocol, allows participating countries to trade emission permits or allowances that have been previously allocated. Only Annex B parties may participate in emissions trading. Article 12 of the Protocol establishes the "clean development mechanism," which allows Annex I parties to invest in sustainable development projects in developing countries and use the certified emission reductions (CERs) that accrue from the projects to achieve compliance with part of their quantified emission limitation and reduction obligations (QELROs). Whereas emissions trading is carried out among Annex I Parties, the CDM involves participation by both Annex I and non-Annex I Parties.

A. Annex I Trading

The Kyoto Protocol establishes mandatory greenhouse gas (GHG) emission reduction targets, or QELROs, for Annex I

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6. Annex B Parties are the same as Annex I Parties under the FCCC. Because the Protocol's text only refers to these countries as Annex I, this Article assumes the same designation. The original Annex I countries are Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, the European Community, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, the Russian Federation, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, and the United States. See United Nations Framework Convention on Climate Change, opened for signature June 4, 1992. S. Treaty Doc. No. 102-38 (1992), Annex I, 31 I.L.M. 849 (hereinafter FCCC).
7. Kyoto Protocol, supra note 2, art. 12.2. QELROs refer to the emission reduction targets contained in Annex B of the Protocol. See id. Annex B.
8. See id.
At the same time, the Protocol provides an emissions trading mechanism through which Parties may meet their QELROs. QELROs are targets for emissions reductions. Specifically, Annex I Parties or other Parties that have adopted legally binding emissions limitations may engage in emissions trading to meet their QELROs, subject to rules and procedures adopted by the Conference of the Parties/Meeting of the Parties (COP/MOP). The trading system established would probably involve trading emissions allowances or emissions reduction credits. Under a cap and allowance system, an overall net GHG emissions cap for Annex I Parties would be set, with permitted emissions for each member set for each year or cumulatively over a period of years. Each Party would then distribute allowances to entities as it sees fit. Under an emissions budget system, a limitation on cumulative emissions during a given budget period is imposed on each Party, who must then agree to meet its budgeted level of emissions for the budget period. Tradeable emissions units (TEUs) generically refer to the commodity traded. Trading during the first commitment period can allow Parties flexibility in meeting their QELROs. Under the Protocol, banking of emissions reductions is allowed only from the first commitment period to subsequent periods. Further, the possibility exists that Parties will engage in the trading of allowance futures prior to and during the first commitment period.

For purposes of this Article, we envision that the private sector will participate fully in Annex I trading. Because

9. Id. art. 3.
10. See id. art. 17.
12. See Kyoto Protocol, supra note 2, art. 17. One constraint on the emissions trading system is that trading must be "supplemental" to domestic actions for purposes of meeting QELROs. However, the extent to which Article 17 emissions trading can contribute to meeting the QELRO commitments has not been established.
14. See id. at 5.
15. See id. at 5-6.
16. See id. at 5.
17. See Kyoto Protocol, supra note 2, art. 3.13.
emissions trading creates a tradable asset, it is particularly attractive to industry.\textsuperscript{19} Two possible scenarios could emerge from the inclusion of the private sector: (1) internationally, trades would occur only between Annex I Parties, while nationally, individual governments could allow trading among the private sector (including business entities and other NGOs); or (2) Annex I countries, the private sector, and others could participate freely in international trading of allowances. Under both scenarios, Annex I Parties that participate in trading will presumably issue allowances or credits or otherwise provide for recognition of TEUs for domestic private entities who may then pursue trading on an independent basis. Realistically, most, if not all, emissions trading will take place through the private sector. TEUs held by private sector entities will be attributed to their host States for purposes of determining the States' QELRO compliance.\textsuperscript{20}

Under Article 17, private entities cannot be held directly accountable to the COP/MOP for a trade; accountability can only be expressed through their State-Parties. Therefore, to establish an initial framework for trading, some commentators have suggested a two-stage approach, where each participating country would develop a trading system at a national level, which would then participate in intergovernmental trading.\textsuperscript{21} Once established, trading among private entities could be widened across borders with intermediary brokers appointed by governments.\textsuperscript{22} Under this approach, each national government would have the authority to determine the assignment or recognition of TEUs to private entities.\textsuperscript{23} Preferably, Parties could agree to a mutual recognition of domestic systems and trades between the systems. National government legislation would then establish the mechanics of each country's trading regime. This approach would appeal to each Party's desire to design an


\textsuperscript{20} The attribution issue may present significant legal and policy issues which are not addressed in this Article.

\textsuperscript{21} See Missfeldt, supra note 18, at 129.

\textsuperscript{22} See id.

\textsuperscript{23} The United States used a similar approach by establishing a national market in sulfur dioxide emission allowances. See Robert Hahn & Gordon L. Hester, Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program, 6 YALE J. ON REG. 109, 114 (1989). Under the sulfur dioxide emissions program, EPA regulations specify that reductions must be surplus, enforceable, permanent, and quantifiable in order to qualify as emission reduction credits. See Final Trading Policy, 51 Fed. Reg. 43,814, 43,831 (1986).
appropriate domestic implementation program taking into account national legal and corporate structures.

Under the FCCC, the COP/MOP has the responsibility to define the "relevant principles, modalities, rules and guidelines... for verification, reporting and accountability" in connection with Annex I trading.\textsuperscript{24} Conceivably, monitoring and tracking of emissions will occur through the establishment of an international reporting system. First, a Convention/Protocol Authority (C/P Authority) would be responsible for the initial approval of each country's monitoring system. The C/P Authority would also track Parties' TEU holdings and trades, and based on emission monitoring and bookkeeping records of TEU holdings, would determine Parties' compliance with their QELROs. The C/P Authority would receive and review monitoring reports generated by Parties.\textsuperscript{25} In that regard, the C/P Authority should set forth reporting standards so that reports from Parties to the C/P Authority will be harmonized to the extent possible. Through its national reporting system, each Party would be responsible for tracking emissions of GHGs.\textsuperscript{26}

\subsection*{B. The Clean Development Mechanism}

Several models have been suggested for devising an international investment scheme under the CDM. The Kyoto Protocol itself suggests that the CDM might function more along the lines of a development bank.\textsuperscript{27} Some commentators advocate the establishment of a central fund, while others promulgate bilateralism and direct investor-host relations.\textsuperscript{28} Another suggestion involves mixing approaches through the establishment of a CDM mutual fund.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{24} FCCC, supra note 6, art. 17.
\item \textsuperscript{25} See Richard Stewart et al., \textit{The Clean Development Mechanism—Building International Public-Private Partnership—A Preliminary Examination of Technical, Financial \\ & Institutional Issues.} at 9, U.N. Doc. UNCTAD/GD5/GF5B/Misc.7 (1999) [hereinafter Stewart, \textit{The CDM}].
\item \textsuperscript{26} Within the United States acid rain emissions trading system, a source's compliance is defined exclusively in terms of comparing actual emissions with the number of allowances held. See \textit{Environmental Defense Fund (EDF). Cooperative Mechanisms Under the Kyoto Protocol; The Path Forward 32} (1998), available at <http://www.edf.org>.
\item \textsuperscript{27} See Kyoto Protocol, supra note 2, art. 12.6 ("The clean development mechanism shall assist in arranging funding of certified project activities as necessary.").
\item \textsuperscript{28} For a discussion of these models, see Philippe Sands et al., \textit{Institutional Aspects of the CDM 3-4} (1998), available at <www.unctad.org/en/subsites/etradereasear.htm>.
\item \textsuperscript{29} See id. at 4.
\end{itemize}
Article 12 of the Kyoto Protocol allows CERs that have been obtained before the first commitment period of 2008 to 2012 to be used by Annex I Parties to meet their QELROs. The CDM also explicitly envisions private party investment in projects that achieve GHG emission reductions. It remains an open issue how the earned CERs can be used by private investors and Annex I Parties in order to meet their emission targets. Presumably, CER holdings by private entities would be attributed to host States to determine the latter's QELRO compliance. CERs could also be used by private entities to meet applicable domestic regulatory emission reduction limitations.

The issuance of CERs requires rules and procedures. To establish a market, emission reductions must be translated into a readily tradeable commodity. In order to ensure maximum fungibility and prevent ex post devaluation, the validity of credits will have to be ascertained. The CDM's Executive Body should undertake general oversight of the registration of projects and the certification of credits. However, the day-to-day registration of projects, monitoring of net emissions certification of credits, and tracking of CER trades and holdings requires appropriate capacity to carry out such monitoring tasks and should therefore be contracted out to private entities. Those entities will have to be accredited by CDM authorities.

30. See Kyoto Protocol, supra note 2, art. 12.10 ("Certified emission reductions obtained during the period from the year 2000 up to the beginning of the first commitment period can be used to assist in achieving compliance in the first commitment period.").
31. See id. art. 12.9.
32. See id. art. 12.3(b). This Article provides that:
   Parties included in Annex I may use the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3, as determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol.
33. See id. art. 12.5. This Article provides that:
   Emission reductions resulting from each project activity shall be certified by operational entities to be designated by the Conference of the Parties serving as the meeting of the Parties to this Protocol, on the basis of: (a) Voluntary participation approved by each Party involved; (b) Real, measurable, and long-term benefits related to the mitigation of climate change; and (c) Reductions in emissions that are additional to any that would occur in the absence of the certified project activity.
34. See id. art. 12.4 ("The clean development mechanism shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Protocol and be supervised by an executive board of the clean development mechanism.").
35. See id. art. 12.5.
A central issue is whether CERs should be certified *ex ante* or *ex post*. Under an *ex post* approach,\(^3\) which seems most likely to be adopted, projects would initially have to be registered as meeting CDM criteria, but credits would be certified only after they have been generated. On the one hand, this ensures a high level of certainty about the validity of credits, thus enhancing the fungibility of CERs. On the other hand, *ex post* certification introduces potential investor uncertainty and could therefore retard the CDM's development.

Decisions about operational and administrative aspects of the CDM (that is, fund approach, mutual fund, or bilateralism) will have ramifications on the types of disputes and the nature of disputants participating in them. Preferences of the international actors will act as a constraint on the design of a noncompliance mechanism and the creation of appropriate international institutions. Given the reluctance of States to submit to binding arbitration, a soft approach, coupled with a robust certification process, might meet their preferences. This, however, will have to be balanced with the creation of a mechanism for the settlement of disputes that also meets the needs of private investors, who favor swift, efficient, enforceable, and predictable dispute resolution procedures.\(^3\)

A strong monitoring, verification, and compliance system can play a major part in Parties' compliance and the integrity of trading systems. Conversely, weak oversight and compliance mechanisms generate uncertainty in the market. The ultimate oversight of monitoring and verification should lie with the COP/MOP and Executive Board (CDM authorities), but actual verification through on-site inspections, to the extent necessary, would have to be carried out randomly by private entities.\(^3\)

Disputes might arise over a decision not to register a project or not to certify CERs, or to revoke CERs previously issued. Therefore, decisions by the CDM authorities and the certification and verification bodies would have to be subject to a review process at the instigation of the Parties and investors. If the institutions of the CDM and the Annex I trading regime are

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38. See Kyoto Protocol, *supra* note 2, art. 12.7 ("The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, elaborate modalities and procedures with the objective of ensuring transparency, efficiency and accountability through independent auditing and verification of project activities.").
different, disparate regimes may emerge, exacerbating the possible competition between the CDM and Annex I trading systems.

The Kyoto Protocol combines environmental and developmental concerns by requiring that projects in non-Annex I countries contribute to sustainable development.\textsuperscript{39} CDM projects must generate emission reductions that are additional to any reductions that would be generated in the absence of the project. To measure this additionality, a non-Annex I country must establish a counterfactual baseline, that is, determine the amount of GHG emissions in the absence of the project.\textsuperscript{40} Disputes might arise over the meaning of these terms, especially concerning the registration of projects or the certification of emission reductions. A non-Annex I host state might expropriate an investment claiming that a project in fact stifles development. Alternatively, a Party to the Kyoto Protocol could bring a claim on the basis of scientific evidence that although a project reduces GHG emissions, it damages the environment in other ways. Disputes over the concept of additionality may arise if the investor and non-Annex I host country exaggerate the amount of GHG emissions in the absence of the project.\textsuperscript{41} Another unresolved issue is whether sinks constitute eligible projects under the CDM. Article 12 of the Kyoto Protocol does not expressly mention them.

A way to address these issues is to develop a pre-approved list of projects allowed to earn emission credits automatically. It is also possible to require the use of technologies that meet certain minimum standards of emission reductions of GHG per unit of output.\textsuperscript{42} Alternatively, the CDM could predefine the range of projects or exclude certain types of projects under Article 12 (by analogy to Article 6).\textsuperscript{43} In the future, one could also supplement the criterion of additionality with one of maximum feasible emission reduction to ensure that GHG reductions occur for certain.\textsuperscript{44} The resolution of these issues in particular cases can create general disputes involving the operational entities,

\begin{itemize}
    \item \textsuperscript{39} \textit{id.} art. 12.5.
    \item \textsuperscript{40} See \textit{id.} art. 12.5(c). For a discussion on this topic, see Jacob Werksman, \textit{supra} note 37, at 148.
    \item \textsuperscript{41} See Missfeldt, \textit{supra} note 18, at 134.
    \item \textsuperscript{42} See \textit{id.}
    \item \textsuperscript{43} See \textit{id.}
    \item \textsuperscript{44} Missfeldt suggests that if, for example, a power plant was to be built, countries should be required to build a windpark instead of clean coal power plant. See \textit{id.}
\end{itemize}
Parties, private entities, and possibly NGOs.

II
INTERNATIONAL DISPUTE RESOLUTION MODELS

A. Traditional Dispute Resolution Procedures: Arbitration, Conciliation, and the International Court of Justice

The FCCC contains standard international dispute settlement provisions but allows room for the development of additional mechanisms.\(^45\) Article 14 of the FCCC provides for conciliation, arbitration, and recourse to the International Court of Justice (ICJ) as a means of settling disputes among Parties.\(^46\) Primary reliance on these traditional dispute settlement mechanisms will do little to give teeth to the dispute settlement process under the FCCC for several reasons. First, submission to the ICJ is voluntary,\(^47\) and with the exception of one Party, none have accepted a dispute resolution clause that would make recourse to established dispute settlement procedures mandatory.\(^48\) Second, *locus standi* before the ICJ is restricted to State entities and therefore inadequate to address disputes involving non-State entities (for example, private parties).\(^49\) Third, proceedings before the ICJ might be too adversarial to preserve the smooth functioning of an international investment relations scheme. That is, an Annex I country government could espouse the claim of an investor and bring a case in front of the ICJ but might thereby sour the relationship with the non-Annex I host country of the investment. Because standing before the ICJ is dependent upon showing injury, cases of noncompliance by Parties with Protocol obligations, for example, will be difficult to bring by other Parties. For example, a third Party, not itself involved in the CDM project, may be unable to challenge the issuance of credits or registration of a project, especially if it has suffered no direct injury. It would be required to show that the project's inconsistency with the Protocol and harm to the environment proximately injures itself. Finally, the lack of fast

\(^{45}\) FCCC, supra note 6, art. 13.
\(^{46}\) Id. art. 14.
\(^{48}\) See id.
\(^{49}\) See id.
proceedings and expertise will also render the ICJ a less attractive choice for the FCCC.

Arbitration and conciliation would probably meet with greater acceptance by Parties because they offer more choice over the selection of judges.\textsuperscript{50} Arbitration and conciliation also offer the advantage of speed and flexibility.\textsuperscript{51} Nevertheless, both options come at a cost: although an award is binding, it binds only the Parties to the dispute. Moreover, the FCCC and Protocol require the development of uniform and consistent rules because consistency is necessary to ensure equity among parties and to promote the development of TEU markets. While arbitration and conciliation lack such reassurances, ICJ decisions do constitute at least some persuasive authority and thus might provide the uniformity necessary for an international regime that imposes sanctions on noncompliant Parties.

In contrast to arbitration between States, private commercial arbitration for disputes between investors and project sponsors provides an attractive solution. Private commercial arbitration can now take place before the International Centre for the Settlement of Investment Disputes that allows for standing of private and State parties.\textsuperscript{52} A two-tiered system in which all disputes involving at least one non-State entity is submitted to private commercial arbitration can then address the lack of standing of private parties before traditional international dispute settlement bodies.\textsuperscript{53} Disputes involving two States would still be disposed of through traditional international dispute settlement. Drawbacks of this regime are fragmentation and the lack of uniform decisions in disputes between States and non-State entities. In addition, a two-tiered system is an inconvenient option if \textit{ex ante} certification were to be adopted and credits earned by the private investor and subsequently transferred to the Annex I country were decertified. These cases would involve private investors, project sponsors, Annex I countries, and, possibly, non-Annex I host-countries.

Lack of uniform decisionmaking under arbitration also applies to disputes that solely involve private parties. This stems from the fact that parties are able to select the substantive law to resolve their disputes in the agreement to arbitrate.\textsuperscript{54} The


\textsuperscript{51} See id.

\textsuperscript{52} See infra Part II.F.

\textsuperscript{53} See id.

\textsuperscript{54} See Andreas F. Lowenfeld, International Litigation and Arbitration 338
procedural law flows from the situs of the arbitration with arbitration centers offering sophisticated procedures. The substantive law to be applied by the arbitrators is subject to bargaining between the parties— as are many other clauses of an international contract. This safety-valve allows investors to opt out of the laws of a given State that does not provide adequate legal safeguards. On the other hand, if competition for CER projects in non-Annex I countries were fierce once emission reductions became binding, these countries would then acquire commensurately greater bargaining power over the choice of law clause, thereby increasing the legal risk factor associated with making foreign direct investments.

The possible disadvantages of arbitration are off-set by the fact that the New York Convention has rendered arbitral awards enforceable in any country that is a signatory to the Convention. Uniform enforcement does not yet apply in the case of foreign judgments. Under the New York Convention, enforcement has become virtually automatic subject to narrowly defined exceptions. A signatory to the New York Convention would therefore be required to enforce an arbitral award rendered against its own nationals. Moreover, a party could also have the award enforced in any other signatory to the Convention, including its home State, thus safeguarding due process and execution in a way that recourse to the courts does not.

B. Additional Dispute Settlement Procedures Provided Under the FCCC and the Kyoto Protocol

Along with the traditional international dispute resolution mechanisms described above, the FCCC allows room for the development of additional mechanisms. The FCCC provides that

55. See id. at 338-42.
56. See id. at 331.
58. See LOWENFELD, supra note 54, at 332.
59. These exceptions are: the award was not made in the territory of a Party state, see New York Convention, supra note 57, art. I(1); the subject matter of the dispute was not commercial in nature, see id. art. I(3); the award was not binding in the country where it was made, see id. art. V(1), (3); the arbitrator was under some incapacity, see id. art. V(1)(e); or the enforcement of the award would offend public policy, see id. art. V(1)(b).
60. See generally id.
the COP/MOP "shall . . . consider the establishment of a multilateral consultative process [MCP] . . . for the resolution of questions regarding the implementation of the Convention."61 The MCP is envisioned as a mechanism that will supervise compliance of the Parties with their commitments under the Convention, perhaps through an ad hoc panel with advisory and adjudicatory functions.62 The MCP is triggered upon a Party's request.63 It should be noted, however, that the COP/MOP is not required to establish the MCP, nor does the FCCC provide any direction as to its design.

The dispute settlement provisions of the Kyoto Protocol work in concert with the FCCC and establish expert review teams who report to the COP/MOP and are coordinated by the Secretariat.64 The expert review teams provide a "thorough and comprehensive technical assessment of all aspects of . . . implementation."65 Their responsibilities will include review of each Party's annual inventory of emission allowances, as well as national communications regarding allowance trading.66 Thus, expert review teams have a mandate to assess implementation of the Parties' commitments and to identify potential problems, while at the same time to provide a transparency function.67 Although the Protocol establishes these expert review teams, their potential role in a dispute settlement mechanism has not been determined.

Article 18 of the Protocol also directs the COP/MOP to establish a noncompliance procedure that includes "the development of an indicative list of consequences, taking into account the cause, type, degree, and frequency of noncompliance."68 Accordingly, the Protocol outlines a flexible system of compliance where noncompliance factors are to be evaluated on a case-by-case basis.69 Specific noncompliance factors may, however, prove difficult to negotiate. Article 18 also provides that any subsequent, binding compliance instrument must involve the amendment, re-ratification, and subsequent

61. FCCC, supra note 6, art. 13 (emphasis added).
63. A Party's request could include questions a Party raises about itself, or issues raised by another Party or group of Parties. See FCCC, supra note 6.
64. See Kyoto Protocol, supra note 2, arts. 8.1, 8.2.
65. Id. art. 8.3.
66. See id. art. 8.
67. See RESPONDING TO NON-COMPLIANCE, supra note 47, at 15.
68. Kyoto Protocol, supra note 2, art. 18.
69. Id.
entry into force of the Protocol. This adds a potentially time-consuming prospect to the development of noncompliance procedures.

Read together, the FCCC and Kyoto Protocol allow a great deal of flexibility in the design of the dispute resolution mechanism. In developing a noncompliance procedure, the COP/MOP may choose to establish an adjudicatory panel as part of the MCP, but it is not required to do so. Both the noncompliance procedure and MCP deal with issues of implementation, but the relationship between the two mechanisms has yet to be determined.

C. GATT/WTO Dispute Settlement

In 1995, the World Trade Organization implemented new settlement procedures for disputes that arise under the General Agreement on Tariffs and Trade, which may be used as a model in designing a compliance mechanism under the Kyoto Protocol. The GATT/WTO has emerged as a unique and innovative system of compulsory and binding dispute settlement that ensures the development of consistency in the interpretation and evolution of GATT/WTO law. Its features include: (1) a single dispute resolution mechanism for all aspects of the GATT, which effectively nullifies the potential for forum shopping; (2) an Appellate Body review of panel decisions; and (3) an implementation and enforcement procedure for dispute settlement decisions.

1. Key Aspects of the GATT/WTO Dispute Settlement Process

The Dispute Settlement Understanding (DSU), which embodies the results of the GATT's Uruguay Round, establishes a system of panels and appellate review to administer dispute resolution provisions and encourage voluntary compliance with its rules through the use of incentives. The DSU is binding and enforceable on all GATT State-Parties. It ensures that all

70. Id.
72. See id. art. 1.
73. See id. art. 17.
74. See id. art. 21.
75. See DSU, supra note 71.
76. See id. art. 1.
dispute settlement procedures under GATT are brought within a single dispute resolution process overseen by the newly created Dispute Settlement Body (DSB).\textsuperscript{77} The DSB is charged with administering the rules and procedures of the WTO's dispute settlement provisions and has the "authority to establish panels, adopt panel and Appellate Body reports" and ensure the implementation of panel rulings.\textsuperscript{78} However, the DSB may not limit or enlarge the rights and obligations of WTO members.\textsuperscript{79}

The DSU contains traditional international dispute settlement provisions voluntarily agreed upon at any time by the disputing Parties.\textsuperscript{80} Disputes not settled by these means may be submitted to the DSB.\textsuperscript{81} At a State-Party's request, a fact-finding panel may be established to make recommendations to the DSB.\textsuperscript{82} Panels are generally comprised of three panelists but may be expanded to five.\textsuperscript{83} The panelists are nominated by the Secretariat and selected from "well-qualified governmental and/or non-governmental individuals," including former representatives of a GATT contracting Party, senior trade policy officials, or scholars on international trade law.\textsuperscript{84} Each panelist serves in an independent capacity, not as a representative of any government or organization.\textsuperscript{85} Prior to the first panel meeting, the Parties must present written submissions setting forth their respective cases.\textsuperscript{86} During the panel's review, each State-Party has an opportunity to make rebuttal submissions and oral arguments.\textsuperscript{87} Interim draft reports are issued to the Parties, who may then submit a written request for the panel to review specific aspects of the interim report prior to circulation of the final report to GATT State-Parties.\textsuperscript{88} The interim reports contain detailed findings and recommendations to the DSB.\textsuperscript{89}

Once a panel issues its recommendations and circulates its report among the GATT State-Parties, the DSB adopts the report within sixty days of circulation unless consensus exists among

\begin{footnotes}
\footnote{77. See id. art. 2.1.}
\footnote{78. See id.}
\footnote{79. See id. art. 19.2.}
\footnote{80. See id. art. 5.1. These provisions include good offices, conciliation, and mediation. See id.}
\footnote{81. See id. art. 1.}
\footnote{82. See id. art. 6.}
\footnote{83. See id. art. 8.5.}
\footnote{84. Id. art. 8.}
\footnote{85. See id. art. 8.9.}
\footnote{86. See id. arts. 6, 12(b).}
\footnote{87. See id. art. 15.}
\footnote{88. See id. art. 15.2.}
\footnote{89. See id.}
\end{footnotes}
State-Parties against adoption or if a State-Party to the dispute decides to appeal. If either State-Party to the dispute disagrees with the Panel report, they may appeal to a standing Appellate Body. Only Parties to the dispute, not third Parties, may appeal a Panel report. The Appellate Body is comprised of seven people, and for each case, three of the seven members are assigned to hear the appeal. The DSB appoints authorities in international trade law to serve four-year terms on the Appellate Body. The Appellate Body's jurisdiction is limited to the issues of law covered in the panel report and legal interpretations developed by the panel.

The decision of an Appellate Body is adopted by the DSB unless a consensus of the DSB votes otherwise. Further, the Parties to the dispute must accept unconditionally the appellate decision provided that the DSB adopts it. Deliberations are confidential under both Panel and Appellate Body procedures. To ensure that the process is not unreasonably delayed, strict time limits are imposed on the dispute settlement process. The period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption must not exceed nine months when there is no appeal, or twelve months when the report is appealed.

2. Enforcement

Under the DSU, compliance with determinations of the DSB may be achieved through: (1) adopting a panel report recommendation by the Party whose practices are challenged (a report will almost always specify an obligation to bring the national practices and law into consistency with the GATT clauses, such as withdrawal of the measures concerned); (2)
adopting compensatory measures by the Party whose practices are questioned (for instance, a government might renege on its commitment not to exceed a specified tariff on an item, but could restore the balance of GATT concessions through compensatory reductions in tariffs on other items); or (3) suspending concessions or other obligations under the GATT of the Party whose practices are found in violation of GATT principles.\textsuperscript{101} If a member chooses not to implement panel recommendations or provide compensatory benefits within a reasonable time period, the DSB automatically sanctions the member.\textsuperscript{102} Thus, where the offending Party declines to change its measures or provide compensation, it may suffer retaliation against its exports as authorized under the WTO in order to restore the balance of negotiated concessions. For a disagreement over the amount and duration of sanctions or time for compliance, the member has a right to expedient arbitration.\textsuperscript{103}

Notably, the WTO rules are not binding in the traditional sense. Rather, the WTO DSU relies upon voluntary compliance. The DSU indicates that adoption by the Parties of a panel report recommendation is the preferred method of resolution.\textsuperscript{104} Compensation or retaliatory measures are resorted to only if other remedial measures (such as withdrawal of the disputed trade measure) are unavailable.\textsuperscript{105} Moreover, suspension of obligations (and implicitly, rights) under GATT shall be invoked only as a measure of last resort.\textsuperscript{106} Some commentators have interpreted these provisions to allow a choice by the Parties to change disputed practices or pay compensation.\textsuperscript{107} Another interpretation, however, is that an adopted panel report obligates the Party in question to change its practice according to the report's recommendations.\textsuperscript{108} Thus, compensation or suspension of obligations become fallback approaches in the event of noncompliance.\textsuperscript{109}

\textsuperscript{101} See id. arts. 19, 22.
\textsuperscript{102} See id. art. 22.
\textsuperscript{103} See id. art. 25.1 (providing that arbitration is subject to the agreement of the parties, who shall agree upon the procedures).
\textsuperscript{104} See id. art. 22.1.
\textsuperscript{105} See id.
\textsuperscript{106} See id.
\textsuperscript{109} See id. at 63-64.
3. Disadvantages of the GATT/WTO Dispute Settlement Procedures

Although the DSU contains many innovative aspects, it does have its drawbacks. For example, other issues related to sovereignty and the standard of review have yet to be resolved. The GATT/WTO dispute settlement procedures require nations to submit to an external dispute resolution authority, which many nations are hesitant to do. For instance, despite agreeing to use WTO settlement procedures, the U.S. Congress retains the right to disregard GATT agreements when warranted by national interests.\(^{110}\)

Further, two important questions remain unanswered. First, to what extent should the international body defer to a national government involved in the dispute? Second, what happens when the WTO Panel ruling conflicts with a State-Party's internal laws or regulations, or its obligations under other international agreements?\(^{111}\) At present, the DSB is only required to consider the disputing nations' obligations under GATT; it need not consider competing bilateral or multilateral treaties even if both Parties to the dispute ratify the competing treaty.\(^{112}\)


The United Nations Convention on the Law of the Sea (UNCLOS)\(^{113}\) provides an elaborate system of dispute settlement, including compulsory procedures that entail binding decisions. At the outset, the dispute settlement provisions of UNCLOS urge Parties to settle their disputes by peaceful means of their own choice at any time.\(^{114}\) However, if the Parties cannot choose a means of settlement, or choose a means that proves unsuccessful, the Convention's compulsory procedures come

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114. See id. art. 280.
Where Parties fail to reach an independent settlement of their dispute, UNCLOS allows Parties to choose among four different forums through which they must resolve their dispute: (1) the International Tribunal for the Law of the Sea; (2) the International Court of Justice; (3) international arbitration; and (4) special arbitration for disputes in certain subject areas (fisheries, the marine environment, and marine scientific research and navigation). When signing, ratifying, or acceding to the Convention, or at any time thereafter, a State is able to choose by written declaration one or more of these means for the settlement of disputes under the Convention.

If the Parties to the dispute choose the same forum, then that forum has jurisdiction over the dispute upon the unilateral application of either Party. Where Parties do not choose the same forum or have made no choice, arbitration becomes the compulsory method for dispute settlement. The arbitration and conciliation procedures require the U.N. Secretary-General to draw and maintain a list of arbitrators and conciliators, with each State-Party entitled to nominate four members for each list. Parties can make general, regional, or bilateral agreements establishing alternative procedures to those laid out under UNCLOS, provided that any dispute is submitted to a dispute settlement process that entails a binding decision. This approach recognizes that different types of disputes may require different approaches and thus allows Parties the ability to choose the dispute settlement procedure most compatible with their needs. Since a breach by any State-Party constitutes a legal injury to every State-Party, if no directly injured State is available to pursue the claim, dispute settlement procedures may be invoked against a breaching State by any State-Party.

115. See id. art. 286.
116. See id. art. 287, para. 1. State-Parties may nominate experts "whose competence in the legal, scientific or technical aspects of such field is established and generally recognized and who enjoy the highest reputation for fairness and integrity." Id. Annex VIII, art. 2(3).
117. States may change their elected dispute settlement system. See id. art. 287.
118. See id.
119. See id. art. 287(3).
121. See UNCLOS, supra note 113, art. 282.
122. See Jonathan Charney, Third State Remedies in International Law, 10 MICH. J. INT'L L. 57, 64 (1989).
1. Applicable Law

One of the characteristics of UNCLOS, in contrast to the GATT/WTO DSU, is that it explicitly brings other international rules and regulations under its auspices. Article 197 provides:

States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.123

In addition, Article 237 refers to obligations under other international agreements that protect and preserve the environment. It provides that the provisions of UNCLOS are "without prejudice to the specific obligations . . . which may be concluded in furtherance of the general principles set forth in this Convention."124 Moreover, the reach of Article 237 includes both past and future agreements, to be implemented in a manner consistent with UNCLOS' general principles. Finally, Article 293 states that an International Tribunal for the Law of the Sea (ITLOS) tribunal shall "apply this Convention and other rules of international law not incompatible with this Convention."125 Under UNCLOS, even non-legal dispute settlement mechanisms are subject to community scrutiny, and Parties are precluded from entering into external agreements that would interfere with the objectives of the Convention.126

2. International Tribunal for the Law of the Sea

The central institution established under UNCLOS is the ITLOS.127 ITLOS is comprised of twenty-one independent members who are elected by secret ballot for a nine-year term.128

123. UNCLOS, supra note 113, art. 197.
124. Id. art. 237, para. 1.
125. Id. art. 293, para. 1.
126. See id.
128. See UNCLOS, supra note 113, Annex VI, art. 2, para. 4 & art. 4, para. 4; Shabtai Rosenne, Establishing the International Tribunal for the Law of the Sea, 89 Am. J. Int'l L. 806, 808 (1995). Persons elected to the Tribunal are those nominees
As with the ICJ, a member of the Tribunal is not disqualified for being a national of one of the disputing Parties. In cases where one member of the Tribunal is a national of a disputing Party, an ad hoc member may be appointed by the underrepresented Party.\textsuperscript{129} In its determinations, ITLOS is limited to cases where its application is consistent with the Convention or with a contract, or where the International Sea-Bed Authority (Authority) has exceeded its jurisdiction or misused its power.\textsuperscript{130} It may not invalidate any rules or regulations adopted by the Authority.\textsuperscript{131}

In addition to the Parties to UNCLOS, dispute settlement under ITLOS is open to international organizations in certain circumstances,\textsuperscript{132} and may be used by States that are not Parties to the Convention.\textsuperscript{133} Even private entities may participate under the auspices of the Sea-Bed Disputes Chamber.\textsuperscript{134}

3. \textit{International Sea-Bed Authority}

The International Sea-Bed Authority is an organization that organizes and controls activities relating to the exploration and exploitation of the sea-bed beyond the limits of national jurisdiction. The membership comprises State-Parties to UNCLOS and non-State-Parties that have consented to apply the Agreement provisionally.\textsuperscript{135} The principle organs of the Authority are an Assembly,\textsuperscript{136} a Council,\textsuperscript{137} and a Secretariat.\textsuperscript{138} The

who obtain the greatest number of votes and a two-thirds majority of the State-Parties. ITLOS members are to be "persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea." UNCLOS, supra note 113, Annex VI, art. 2, para. 1.


130. \textit{See} UNCLOS, supra note 113, Annex VI, art. 21.

131. \textit{See id.} art. 189.

132. \textit{See id.} Annex VI, art. 20, para. 2.

133. The Draft Rules of the Tribunal provide that a non-State-Party may have access to the Tribunal if it is a Party to an agreement conferring jurisdiction on the Tribunal, and if it accepts the jurisdiction of the Tribunal or Sea-Bed Disputes Chamber and undertakes to comply in good faith with the Tribunal's decisions. \textit{See} JUAN VINCENTE SOLA, \textit{THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA} 56 (1986).

134. \textit{See} UNCLOS, supra note 113, Annex VI, art. 37.

135. \textit{See id.} art. 156.

136. The Assembly, composed of Authority members, is "the supreme organ of the Authority to which the other principal organs shall be accountable as specifically provided for in the Convention." \textit{Id.} art. 160, para. 1. The Assembly elects the Council members and has the power to establish general policies on any question within the Authority's competence.

137. The Council serves as the executive organ of the Authority in concert with the UNCLOS and the Assembly's general policies. The Council consists of thirty-six members elected from the Assembly. \textit{See id.} art. 161, para. 1. Council members represent four sets of interests: (1) consumers/importers of the minerals that could
“Enterprise” is also established under the Authority to directly carry out sea-bed mining activities. Its activities are governed by the Authority’s rules and decisions.

One distinguishing feature of the Authority is its power to enact legislation relating to deep sea-bed mining, including the equitable sharing of benefits, the financial management and internal administration of the Authority, and the payments and contributions to be made in connection with the exploitation of the continental shelf. The Authority may also negotiate exploration or exploitation contracts with State-Parties, State enterprises, or individuals sponsored by State-Parties.

4. Sea-Bed Disputes Settlement Chamber

Unlike other disputes arising under the Convention, deep sea-bed mining disputes may be brought before the Sea-Bed Disputes Chamber of ITLOS, whose jurisdiction notably allows for the inclusion of non-State entities. The Sea-Bed Disputes

be supplied from the deep sea-bed sources; (2) investors in deep sea-bed mining; (3) producers/exporters of such minerals from land-based sources; and (4) developing countries representing special interests. The Council also includes eighteen members elected according to the principle of ensuring equitable geographical distribution of seats in the Council. See The Netherlands Institute for the Law of the Sea, 11 INT’L ORG. AND L. OF THE SEABED 24 (1995).

138. The Secretariat is comprised of a Secretary-General and staff as required. See UNCLOS, supra note 113, art. 166(1). The Secretary-General acts as the chief administrative officer of the Authority. The staff consists of both scientific and technical personnel. See id. art. 167(1). The Secretariat must respect the international character of the office and remain independent from any government or source attached to the Authority. See id. art. 168(1).

139. UNCLOS, supra note 113, art. 170. Article 170 of the Convention establishes “the Enterprise” as an operating arm of the Authority. Through the Enterprise, the Authority may engage in mining activities. The Enterprise is to conduct its first operations through joint ventures with other commercial enterprises. In addition, the Enterprise is subject to the same obligations as other miners and modifies Article 153(3) of the Convention to ensure that any plan of work submitted by the Enterprise is in the form of a contract like that of any other miner and thus subject to the requirements applicable to any other contractor. With respect to exploitation of the sea, UNCLOS adopts the “parallel system,” whereby any private enterprise seeking to mine the sea-bed must identify two equally exploitable sites. The Authority then has the option of picking which of the two sites it wishes to retain for itself or permitting the mining consortium to exploit the other site. Throughout the system, the Authority incurs no exploration costs and maintains powers to regulate and deny access to particular countries and private consortia.

140. See id. Annex III, art. 12, para. 1; see also KNIGHT, supra note 129, 529-35.


142. See id. at 316.

143. Provisions governing the Sea-Bed Disputes Chamber are found in UNCLOS Part XI, Section 5 and Annex VI.
Chamber was established as an organ of ITLOS to have exclusive jurisdiction over all sea-bed disputes arising between participants in the exploration and exploitation of the sea-bed area.\textsuperscript{144} The Chamber was created in recognition that certain types of disputes involve technical issues that require experts in fields other than international law. Through the Chamber, State-Parties, natural or juridical persons, and international organizations (that is, the Authority and the Enterprise) have access to dispute settlement procedures.\textsuperscript{145} Non-State entities that have access to the Sea-Bed Disputes Chamber include corporations and other entities that make up the potential deep sea-bed mining industry.\textsuperscript{146}

The Chamber is composed of eleven ITLOS members, chosen by the general ITLOS membership for three-year terms.\textsuperscript{147} In electing the Chamber, the voters are required to ensure that the principal legal systems of the world are represented, with equitable geographical distribution.\textsuperscript{148} A quorum in the Chamber is seven, but for certain purposes, a smaller \textit{ad hoc} chamber of three may be formed "with the approval of the Parties."\textsuperscript{149} Thus, the \textit{ad hoc} chamber acts more like an arbitration tribunal because the composition can be determined, to a large extent, by the Parties.\textsuperscript{150} The Chamber must apply the rules of the Authority and the terms of contracts governing sea-bed activities.\textsuperscript{151} Its decisions are enforceable in the territories of State-Parties in the same manner as judgments of the State's highest court.\textsuperscript{152} The Chamber has the power to give advisory opinions at the request of the Assembly or the Council of the International Sea-Bed Authority. In addition, both ITLOS and the

\textsuperscript{144} See SOLA, \textit{supra} note 133, at 93.
\textsuperscript{145} See \textit{id}. Article 187 of the Convention provides that the jurisdiction of the Sea-Bed Disputes Chamber includes disputes between: (1) State-Parties; (2) a State-Party and the Authority; (3) parties to a contract that are Parties to UNCLOS, the Authority of the Enterprise, State enterprises, and natural or juridical persons; (4) the Authority and a prospective contractor sponsored by a State; and (5) the Authority and a State-Party, a State enterprise, or a natural or juridical person sponsored by a State-Party. \textit{See UNCLOS, supra} note 113, art. 187.
\textsuperscript{146} Prospective deep sea-bed contractors must be sponsored by a State-Party to have access to the Chamber.
\textsuperscript{147} See \textit{UNCLOS, supra} note 113, Annex VI, art. 35(1).
\textsuperscript{148} See \textit{id}. art. 35(2).
\textsuperscript{149} \textit{id}. Annex VI, art. 36.
\textsuperscript{150} See \textit{id}. If the Parties cannot agree, the \textit{ad hoc} committee is to be set up in the same manner as an arbitral tribunal, with each Party appointing one member and the third appointed by agreement, or if necessary, by the President of the Chamber. \textit{See id}.
\textsuperscript{151} \textit{See id}. Annex VI, art. 38.
\textsuperscript{152} \textit{See id}. Annex VI, art. 39.
Sea-Bed Disputes Chamber have the power to prescribe provisional measures. The contracting Parties' ability to choose a dispute settlement procedure does not alter the obligation of each State-Party to accept the jurisdiction of the Sea-Bed Disputes Chamber for deep sea-bed mining disputes.

The Sea-Bed Disputes Chamber has a wide residual compulsory jurisdiction over disputes with respect to activities in the international sea-bed area, including disputes involving entities that are not States. Specifically, the Sea-Bed Disputes Chamber has jurisdiction over numerous disputes.

The first two types of contractual disputes that may be brought before the Sea-Bed Disputes Chamber include: (1) the interpretation or application of a relevant contract or a plan of work, and (2) "acts or omissions of a Party to the contract relating to activities in the Area and directed to the other Party or directly affecting its legitimate interest." These areas relate to activities undertaken by the Enterprise and cover most issues that may arise in connection with the interpretation and performance of a contract. Two other types of contractual issues described under the Convention include: (1) disputes concerning the refusal of a contract or legal issues arising during its negotiation between the Authority and a qualified applicant, and (2) disputes regarding the liability of the Authority. Disputes concerning the application or interpretation of a contract can be referred at the request of either Party to binding private

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153. See id. Annex VI, art. 25.
154. See id. art. 287, para. 2.
155. See id. Annex VI, art. 37.
156. UNCLOS provides that the Chamber has jurisdiction over disputes:
   (1) Between State Parties regarding the interpretation or application of Part XI and its related annexes;
   (2) Between the Authority and State Parties regarding:
      (i) Acts or omissions of the Authority in contravention of the Convention or rules and regulations adopted pursuant thereto;
      (ii) An allegation of acts by the Authority in excess of its jurisdiction or a misuse of its power; and
      (iii) Disapproval of a contract for exploration and exploitation of rights.
   (3) Between the Authority and private companies regarding:
      (i) the refusal to approve a plan of work or legal issues arising during the approval process, and
      (ii) the interpretation or application of a contract and activities undertaken pursuant to an approved work plan.

Id. Annex VI, art. 187.
157. Id. art. 187(e)(ii).
158. See id. art. 187(d), (e).
arbitration in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.\textsuperscript{159} However, the arbitral tribunal has no authority to interpret the Convention, and any issues concerning Convention interpretation must be referred to the Chamber for a ruling.\textsuperscript{160}

Many of the issues addressed in establishing a deep sea-bed mining regime are now at the forefront of the design of the Kyoto Protocol’s dispute mechanism. One of the most striking features of UNCLOS is that it provides access to the dispute settlement processes not only for State-Parties, but also for non-State entities having a legal (that is, contractual) relationship with the Authority.\textsuperscript{161} This includes corporations and other entities that make up the potential deep sea-bed mining industry. Thus, with respect to contract disputes, it gives private companies standing to initiate proceedings without the support of the sponsoring State. Even prospective deep sea-bed contractors have access to the Sea-Bed Disputes Chamber and arbitration under the Convention (although they must be sponsored by a State-Party).\textsuperscript{162}

\textbf{E. Dispute Resolution Under the Montreal Protocol}

Like the Kyoto Protocol, the Montreal Protocol\textsuperscript{163} also provides for the establishment of a multilateral consultative process in order to resolve disputes arising under a regime aimed at the abolition of substances that deplete the ozone layer.

\textsuperscript{159} See id. art. 188, para. 2. Commentators note that the split of jurisdiction between the Chamber and arbitration creates problems as to where the line should be drawn between contract interpretation and Convention interpretation. See, e.g., WOLFGANG HAUSER, THE LEGAL REGIME FOR DEEP SEA-BED MINING UNDER THE LAW OF THE SEA CONVENTION 56 (Frances Bunce Dielmann trans., 1983). UNCITRAL developed the UNCITRAL Arbitration Rules to arbitrate international trade disputes between countries with different legal, social, and economic systems. See John D. Franchini, International Arbitration Under UNCITRAL Arbitration Rules: A Contractual Provision for Improvement, 62 FORDHAM L. REV. 2223, 2223 (1994).

\textsuperscript{160} See UNCLOS, supra note 113, art. 189.

\textsuperscript{161} For instance, the Chamber has jurisdiction over disputes between the Authority and prospective contractors, who have been sponsored by a State, concerning the refusal of a contract or other legal issue that arises in negotiating a contract. See SOLA, supra note 133, at 97.

\textsuperscript{162} UNCLOS, supra note 113, art 187(d), Annex VI, art. 37.

Unlike the Kyoto Protocol, however, private parties play no direct role under the Montreal Protocol. Instead, complaints can be initiated by any State-Party that suspects another Party of noncompliance with its treaty obligations. If a finding of noncompliance is entered against a Party, a number of mechanisms are available to bring a Party back into compliance. These mechanisms range from providing assistance to applying trade sanctions for the most egregious violations. Thus, trade in products containing ozone-depleting substances can be suspended with respect to Parties. This approach has worked relatively well under the Montreal Protocol. Under Annex I trading, the suspension of a Party persistently in breach of its obligation can prove a powerful mechanism to effect compliance.

1. Key Aspects of the Noncompliance Procedure

The Noncompliance Procedure involves both the Secretariat and the Implementation Committee of the Montreal Protocol. The Secretariat serves as the Parties' representative to the Montreal Protocol and monitors each Party's progress in meeting reduction requirements, determines the application of trade restrictions, calls meetings of the Parties, and works with the Implementation Committee and the Executive Committee of the Multilateral Fund. This means that noncompliance under the Protocol is not dealt with through a judicial, but rather an administrative body under its auspices and the COP/MOP itself. As a result, the approach to noncompliance is more feasible and akin to diplomatic negotiation than judicial dispute settlement.

A Party's complaint or self-reporting of noncompliance or reporting by the Secretariat sua sponte triggers review. If a Party complains to the Secretariat, the claim must be corroborated by evidence. These claims must be made by the Parties within strict time limits. Within two weeks of receipt of

165. See id. Annex V.
166. See id. Annex V(A), (B).
167. See id. Annex V(C).
168. See id.
169. See id. Annex IV.
170. See id. art. 12.
173. See id. Annex IV(1).
a complaint, the Secretariat forwards a copy to the Party whose status is at issue. The Party then has three months to submit a reply and supporting information to the Secretariat and the Parties involved. If a Party concludes that, despite bona fide efforts at compliance, it is unable to comply fully with its Protocol obligations, then that Party can petition the Secretariat. The Secretariat then submits the entire package to the Implementation Committee for consideration.

The Implementation Committee consists of ten Parties, elected for two years by the Meeting of the Parties based on equitable geographical distribution. The specialized Subsidiary Bodies of Implementation are open to all Parties. However, the level of attendance by Parties at the Implementation Committee has not always been satisfactory.

A crucial aspect of an encouragement-based approach is the maximization of transparency of the proceedings. Transparency enhances the credibility and impartiality of the noncompliance mechanism itself and subjects parties to review. A potential problem, however, may be that countries do not like being exposed to peer review in this way. The Montreal Protocol addresses this concern by making information available to any person upon request, but limiting the dissemination of the information to the requesting parties.

NGOs and non-Parties may participate in the Protocol's multilateral consultative process. They must notify the United Nations Environmental Programme Secretariat of their interest.

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175. See id. Annex III, para 2.
176. See id. Annex VII(2).
177. See id. Annex VII(4).
180. See Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, art. 6(4)(l) (giving Parties the right to establish such subsidiary bodies as are necessary for the implementation of the treaty).
182. See Winfried Lang, Compliance-Control in Respect of the Montreal Protocol, 89 AM. SOC'y INT'L L. PROC. 206, 206 (1995) (defining the "encouragement-based approach" as an approach to dealing with noncompliance that does not punish the party but aids the party in its effort at compliance, and monitors its progress).
183. See id. art. 215.
185. See Montreal Protocol, supra note 163, Annex IV(10); see also id. art. 11(5).
but will only be invited if two-thirds of the Parties assent to their participation as observers.186 Because the Parties must consent to the participation of NGOs, the opportunity to use their strength may be lost in cases where their participation would be politically inconvenient or embarrassing to the country.187 Since the participation of NGOs can become a contentious issue, their participation can turn out to be more adversarial than that of a mere observer.

The power of the Implementation Committee is limited to reporting to the MOP and information gathering through the Secretariat or in the territory of a Party suspected of noncompliance.188 However, this can only occur upon invitation by that Party.189 The Implementation Committee then reports to the Meeting of the Parties.190 After receipt of the report, the Meeting of the Parties decides on procedures needed to bring about full compliance.191 These procedures may include providing assistance in information gathering and reporting by Parties, issuing cautions, and suspending membership to the Protocol in accordance with applicable rules of international law.192 Once the Secretariat receives information about a possible breach of a Party’s obligation, the formalized noncompliance procedure activates if the Party’s reply does not include any proposals for settling the dispute.193 Parties’ efforts to settle amicably can therefore be trumped.194

2. Dispute Settlement

Like the Kyoto Protocol, the Montreal Protocol contains a provision for the settlement of disputes by way of standard international dispute settlement proceedings.195 In contrast to

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186. *See* id. art. 11(5).
187. *See* Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT’L L. 519, 564 (1991) (criticizing the Protocol for failing to affirm a crucial role for NGOs, which threatens to make their participation adversarial). NGOs have played an important monitoring role in other multilateral environmental agreements such as CITES or the Basel Convention. *See* Handl, supra note 181, at 43.
188. *See* Montreal Protocol, supra note 163, Annex IV(7)(a)-(e), (9).
190. *See* id. Annex IV(9).
191. *See* id.
the multilateral noncompliance procedure, a complaint by a non-injured Party may be inadmissible in this context. The relationship between dispute settlement and the noncompliance procedure has yet to be clarified. Thus, it is uncertain what will happen if an international tribunal confronts a dispute pending parallel proceedings under the noncompliance procedure. The Montreal Protocol envisages parallel proceedings. A Party may thus either trigger the noncompliance procedure or have recourse to arbitration or the ICJ in accordance with Article 11 of the Vienna Convention on Substances that Deplete the Ozone Layer. Open issues remain with respect to sanctions; for example, can sanctions under the noncompliance procedure be challenged in international tribunals? Some argue that parallel proceedings are not possible under the Montreal Protocol because Parties are deemed to have waived their right to international dispute settlement if they submit to noncompliance mechanisms. In the unlikely event that sanctions are imposed through the noncompliance procedure while a case is pending before an international tribunal, the latter would have to prevail. Pursuant to the doctrine of *lis pendens*, collective countermeasures under the NCP would have to be stopped if a binding judicial body confronted the same dispute. This argument ignores the possibility that the losing Party might subsequently turn to the ICJ, intending to secure a judgment to overturn the imposition of sanctions under the noncompliance procedure. In a situation such as this, the ICJ would have to grapple with the question of to what extent it feels bound by a determination of the multilateral noncompliance procedure.

3. **Evaluation in the Context of the Objectives of the CDM**

The noncompliance mechanism of the Montreal Protocol offers a number of advantages over traditional dispute resolution

196. See Handl, supra note 181, at 36.
197. See id. at 47. Handl argues that the multilateral consultative process is a political and not a judicial body and that parallel—or subsequent—proceedings are not barred by the doctrine of *lis pendens* or *res judicata*. He maintains that only if a judicial body considered the imposition of sanctions would multilateral responses to noncompliance by the Parties to the Montreal Protocol be pre-empted.
198. See Montreal Protocol, supra note 163, Annex IV, Preamble ("The following [noncompliance procedure]... shall apply without prejudice to the operation of the settlement of disputes procedure laid down in Article II of the Vienna Convention.").
199. See id.
200. See Handl, supra note 181, at 47 (maintaining that a state that had not initiated the NCP itself could not be prevented from resorting to the ICJ even though the matter is under consideration before the NCP).
procedures. It aims less at imposing sanctions and more at assisting a Party to come into compliance to protect the integrity of the regime against would-be defectors.\textsuperscript{201} It is forward-looking and multilateral rather than bilateral and backward-looking.\textsuperscript{202} Moreover, it allows Parties to bring a claim even when they do not suffer any immediate harm from noncompliance with a treaty obligation.\textsuperscript{203} An added advantage is that the noncompliance procedure enables the parties to fine-tune their enforcement of the various normative standards of the multilateral environmental agreement.\textsuperscript{204}

Some critics have argued that flexibility may cause parties to think of compliance as negotiable.\textsuperscript{205} The Montreal Protocol procedure also raises the question of how soft noncompliance procedures relate to hard dispute settlement procedures, and how far noncompliance procedures can handle difficult questions of State responsibility and effectiveness.\textsuperscript{206} In addition, the noncompliance procedure is subject to criticism for granting too many concessions to Parties and allowing too much flexibility in meeting targets. This makes monitoring more difficult. The fact that the Montreal Protocol mainly relies on monitoring and peer review as a means to achieving compliance is perceived as a major weakness by some because it depends on whether a country reports accurately.\textsuperscript{207}

The above criticisms, however, are misplaced. Instead, the Montreal Protocol efficiently deals with failure to report because eligibility for the Multilateral Fund depends on continued reporting.\textsuperscript{208} This could provide a model for the CDM as well, where participation in trading should depend on meeting requirements for reporting. Reporting, of course, assumes central importance for a peer review noncompliance mechanism and for the operation of the system. Further, reporting is vital to the creation of confidence in the market.

Criticisms have been leveled against the Montreal Protocol

201. See id. at 34.
202. See id.
203. See Montreal Protocol, supra note 163, Annex IV(1).
204. See Handl, supra note 181, at 37.
205. See id.
206. See Lang, supra note 182, at 208.
207. See Barratt-Brown, supra note 187, at 542-43.
208. Montreal Protocol, supra note 163, art. 7. The Multilateral Fund was established by the London Amendments and coordinates financial assistance to developing countries, assesses their needs, and participates in capacity-building. See id. Annex II, art. 10: see also Timothy T. Jones, Implementation of the Montreal Protocol: Barriers, Constraints and Opportunities, 3 ENVTL. LAW. 813, 821 (1997).
because it tacitly allows NGOs to participate as observers.\textsuperscript{209} Some other commentators warn that the present form of NGO participation risks politicizing the dispute.\textsuperscript{210} On the other hand, the procedure suffers when private parties are not allowed standing because NGOs can monitor compliance effectively.\textsuperscript{211} The critics seem to suggest that disputes under multilateral environmental agreements can best be resolved through conciliatory processes between States, who are more capable of solving the technical issues involved. Such a view ignores that NGOs can offer additional monitoring capacity and technical expertise. More importantly, however, a trading system relies on stringent, enforceable rules, and dispute settlement. The Montreal Protocol does not allow for standing of private parties; thus, it is less suitable as a model for dispute solution under the Kyoto Protocol because the Kyoto Protocol allows private parties to participate in trading and fulfilling its other objectives. Some critics also view this as too inflexible because it cannot accommodate Parties' preferences for alternative mechanisms of addressing noncompliance.\textsuperscript{212} The Implementation Committee may not have the authority to allow disputing parties to reconcile the dispute without requiring action by the MOP.\textsuperscript{213} Even if the disputing parties arrived at a mutually acceptable settlement, the MOP need not adopt that solution.\textsuperscript{214} So far, the Implementation Committee has shown little commitment to strict enforcement.\textsuperscript{215} Furthermore, the composition of the Implementation Committee of State representatives may raise doubts as to impartiality.

Whether these difficulties also apply to the Kyoto Protocol depends primarily upon two factors: (1) the extent to which States and private entities in the CDM participate as observers, and (2) the extent to which disputes involving private parties can be severed from traditional public international law. The need for a stronger, quicker, and cheaper dispute settlement/noncompliance procedure is commensurate with the degree of private participation in trading. Given that a number of

\begin{thebibliography}{99}
\bibitem{209} See, e.g., Trask, supra note 194, at 1976.
\bibitem{210} See, e.g., Barratt-Brown, supra note 187, at 256.
\bibitem{211} See Handl, supra note 181, at 42 (discussing the role of NGOs under CITES and the Basel Convention).
\bibitem{212} See Trask, supra note 194, at 1986 (pointing out that China has had a preference for informal resolution of disputes and has rejected third party involvement).
\bibitem{213} See Montreal Protocol, supra note 163, Annex IV(8).
\bibitem{214} See Trask, supra note 194, at 1982.
\bibitem{215} See Jones, supra note 208, at 854.
\end{thebibliography}
very different types of disputes are likely to arise under the CDM (ranging from traditional State responsibility questions to issues of international public law to private law disputes), a single dispute solution mechanism might fail to address all the questions involved. With respect to the disputes between States, traditional dispute resolution like that of the ICJ is too slow, too cumbersome, and probably too confrontational.\(^{216}\) Thus, the flexibility and encouragement approach taken under the Montreal Protocol offers advantages, rendering a CDM noncompliance procedure more acceptable to States. Its nonconfrontational nature also ensures amicable relations between the trading partners and is therefore conducive to the maintenance of trade relations. The flexibility of the noncompliance procedure means that membership and staffing of experts can vary so that global issues can be dealt with on a multilateral basis, while bilateral and technical issues like decertification (which require quick decisions) can be dealt with in small, expert committees.\(^{217}\) However, nontraditional consultative dispute settlement mechanisms have a major drawback when implemented in a trading system. Because they constitute an alternative to traditional international dispute settlement, they carry the risk of forum-shopping by disputants. Inconsistent rulings from these various tribunals will create uncertainty, retarding the development of a vibrant market.

Under the CDM, the suspension of the right to participate is likely to be a less effective noncompliance mechanism. Since participation is voluntary and no emission limits apply to developing countries, they suffer few adverse consequences from their expulsion unless CDM-registered projects provide a significant source of revenue. The attractiveness of the CDM for financial investments in developing countries depends on the relative shortage of projects and the price that can be obtained for CERs in the secondary market. This price is a function of the demand for CERs, which in turn depends on the relevant emission reduction limits that a purchaser has or will have to meet in the future. If projects are numerous, investors will be less likely to commit significant resources to CDM projects, which may result in lower incentives for developing countries to create favorable investment climates. Moreover, the effectiveness

\(^{216}\) See Handl, supra note 181, at 34-35.

\(^{217}\) Decertification refers to the revocation of a credit that was earned through investment in a project that achieves emission reductions. Credits issued to the investor may have to be decertified because emission reductions were not accurately monitored. For further discussion, see infra Part IV.A.2.a.
of the threat of suspension from the CDM is closely linked with the market share that a particular country represents. For the most attractive countries for foreign direct investment, the sanction might be unworkable lest the CDM break down. If there is high demand for CERs from Annex I country investors, suspending large markets, such as China, from the right to participate in the CDM will drive up prices for CERs, exacerbate scarcity, and may crowd out investors. Suspending big nations also works adversely to the interests of Annex I countries that are ultimately responsible for ensuring emission limitations compliance for their domestic sources.

F. International Centre for the Settlement of Investment Disputes

Arbitration provides a popular alternative to the resolution of private disputes through courts.\(^{218}\) It offers Parties the maximum choice over the substantive and procedural law that will govern the dispute and choice over the selection of arbitrators. In the case of dispute settlement clauses that provide for recourse to the courts, Parties are able to select the substantive law to govern the contract, but are not normally able to select the forum or the judges, or to opt out of the forum's procedural law. As a result, arbitration is useful in avoiding the legal risk associated with a foreign judiciary and a legal system that may offer less protection than that of the project sponsor's own State. Nevertheless, arbitration can never be completely disassociated from courts;\(^{219}\) enforcement of an arbitral award must still be sought through the courts. With respect to arbitration clauses that govern disputes between private parties, the New York Convention prescribes that an arbitral award must generally be enforced by any State that is a signatory to the Convention, subject only to certain standard grounds for setting aside an award.\(^{220}\) Whereas dispute settlement through arbitration presents an attractive option for investors and private parties, it is incapable of addressing disputes between the investor and the host State that is not a party to the arbitration agreement. In


\(^{219}\) See id.

\(^{220}\) Such grounds include an invalid arbitration agreement, a violation of due process, an excess of the arbitrator's authority, irregular composition of the arbitral tribunal, a setting aside of the award in the country of origin, a violation of public policy if the award is enforced, or the subject matter of the award is non-arbitrable according to the laws of the enforcing State. See New York Convention, supra note 57.
this case, the International Centre for the Settlement of Investment Disputes (ICSID)\(^\text{221}\) provides some remedies because it allows the investor host State to come before an international arbitration panel without requiring espousal. Moreover, judicial enforcement of ICSID awards is guaranteed.\(^\text{222}\)

1. **Key Aspects of the ICSID Mechanism**

ICSID and the Multilateral Investment Guarantee Agency (MIGA), an insurance fund for investors in developing countries, are under the auspices of the International Bank for Reconstruction and Development (World Bank),\(^\text{223}\) with the President of the World Bank acting as a non-voting, *ex officio* chairman of the Administrative Council,\(^\text{224}\) the Centre's governing body.\(^\text{225}\) The Administrative Council consists of one representative of each contracting State.\(^\text{226}\) Unless a State makes a contrary designation, this representative will be its appointed governor of the World Bank.\(^\text{227}\) Thus, each State is represented by one member on ICSID.

An ICSID panel can be constituted either through the choice of the parties or from a roster that ICSID maintains. Each party may name up to four people to serve on this panel, and the chairperson of the Administrative Council may designate up to ten additional people.\(^\text{228}\) Parties can select arbitrators independently or can choose panelists from the roster.\(^\text{229}\) There is no fixed number of arbitrators to empanel, although it must be an uneven number.\(^\text{230}\) If the Parties cannot agree on the number of arbitrators, the Convention fixes the number at three.\(^\text{231}\)

This procedure is advantageous because it allows Parties the maximum choice over the composition of the panel. At the same time, the possibility of appointing a default panel ensures that

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\(^{222}\) See id. arts. 53, 54.

\(^{223}\) See id. art. 2.

\(^{224}\) See id. art. 5.

\(^{225}\) See id. art. 6.

\(^{226}\) See id. art. 4(1).

\(^{227}\) See id. art. 4(2).


\(^{229}\) See Jacob, supra note 228, at 127.

\(^{230}\) See ICSID Convention, *supra* note 221, art. 37(2)[a].

\(^{231}\) See id. art. 37(2)[b].
the settlement of a dispute cannot be prevented through obstruction by one party. The maintenance of a roster gives some degree of permanence to ICSID tribunals.

2. Jurisdictional Matters

The ICSID Convention provides for exclusive jurisdiction over disputes. Thus, recourse to ICSID precludes contemporaneous recourse to other international judicial bodies. Article 25(1) of the Convention stipulates that the Centre has jurisdiction over any legal matter that arises out of an investment. The term "investment" is not defined in the ICSID Convention, which may lead to a progressive extension of the scope of jurisdiction by casting the term "investment" more broadly. Since Parties can control the extent of their consent to ICSID jurisdiction, Parties also retain some control over the types of disputes they want to subject to dispute settlement by ICSID. Without an express limit on the jurisdiction of ICSID, the undefined term "investment" has allowed the ICSID to hear more disputes, thereby extending its case law.

Jurisdiction of ICSID is premised on the prior double consent of the parties to the dispute. First, States must become Parties to the ICSID Convention before private investors can have recourse to ICSID dispute settlement. A bilateral investment protection agreement with the investor's State or national investment legislation may constitute such consent.

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233. See ICSID Convention, supra note 221, art. 26.
234. See Choi, supra note 218, at 178; see also ICSID Convention, supra note 221, art. 26.
235. The Convention states: The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a contracting State (or any constituent subdivision or agency of a contracting State designated to the Centre of that State) and a national of another contracting State, which the Parties to the dispute consent in writing to submit to the Centre. ICSID Convention, supra note 221, art. 25(1).
237. See discussion infra Part II.F.2.
238. See generally Lopina, supra note 236, at 114-15.
239. See Jacob, supra note 228, at 127; see also ICSID Convention, supra note 221, art. 25(1).
240. See Jacob, supra note 228, at 129.
241. Investment protection agreements are called bilateral investment treaties
In order for a subdivision or agency of the State to consent to ICSID jurisdiction, the prior consent of its State is required.\(^{242}\) Multinational companies present a difficulty in the ICSID proceedings: Which country hosts their "nationality"?\(^{243}\)

Second, States must consent to the subject matters over which ICSID may have jurisdiction; however, a State can exclude certain subject areas from ICSID jurisdiction.\(^{244}\) Saudi Arabia, for example, has done so in relation to any matter that falls within national sovereignty.\(^{245}\) The number of States that have limited ICSID jurisdiction in this manner has been small,\(^{246}\) perhaps because investors feel less secure in a State that has excluded some aspect of ICSID jurisdiction.\(^{247}\) Once a Party has fully consented, it cannot withdraw its consent unilaterally.\(^{248}\) Reservations are also subject to Article 66(1), which states that "no amendment shall affect the rights and obligations under this Convention of any Contracting State ..., arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment."\(^{249}\)

Parties eligible for dispute resolution under ICSID are restricted to the host State and the private investor.\(^{250}\) Diplomatic protection by the investor's State is prohibited.\(^{251}\) Because the investor's home State is not allowed to become involved in the dispute, ICSID has achieved the depoliticization of investment disputes.\(^{252}\) The prohibition on espousal and the

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\(^{242}\) See ICSID Convention, supra note 221, art. 25(3).

\(^{243}\) See Jacob, supra note 228, at 128.

\(^{244}\) See ICSID Convention, supra note 221, art. 25(4).

\(^{245}\) See Lopina, supra note 236, at 118.

\(^{246}\) For example, Israel, Papua New Guinea, and Jamaica have limited ICSID jurisdiction. See generally Measures Taken by Contracting States for the Purpose of the Convention: Notification Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre, ICSID Doc. 18.c (1987).

\(^{247}\) See Jacob, supra note 228, at 136.

\(^{248}\) See ICSID Convention, supra note 221, art. 25(1).

\(^{249}\) Id. art. 66(1).

\(^{250}\) See id. art. 25(2).

\(^{251}\) See id. art. 27.

\(^{252}\) See The International Chamber of Commerce Hosts a Third ICSID, AAA, ICC
requirement of remedies election\textsuperscript{253} ensure that an investor cannot commence proceedings that would undermine the authority of an ICSID award. ICSID jurisdiction has been extended through the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings, which allows non-Party States and investors to use the Centre's dispute settlement mechanism.\textsuperscript{254}

3. \textbf{Applicable Law, Enforcement, and Review}

The ICSID Convention stipulates the procedural law to be applied by the panel to any given dispute.\textsuperscript{255} Parties can, however, select the substantive law, but if they fail to do so, then the tribunal will apply the law of the contracting State that is party to the dispute and relevant international law to the dispute.\textsuperscript{256} Once a majority decides a dispute, the award becomes binding upon the Parties,\textsuperscript{257} and those Parties are therefore obliged to treat the award like a decision of the highest court in their jurisdiction.\textsuperscript{258} Losing Parties often invoke violation of due process under the New York Convention as a ground for non-recognition of an award.\textsuperscript{259} This ground, however, is expressly excluded in the ICSID Convention.\textsuperscript{260} Thus, the Convention addresses many of the drawbacks that impeded the success of international arbitration.

\begin{footnotesize}
\begin{enumerate}
\item Symposion, NEWS FROM ICSID, Winter 1986, at 8, 9.
\item See ICSID Convention, supra note 221, art. 26.
\item See Jacob, supra note 228, at 131.
\item See ICSID Convention, supra note 221, art. 44. Parties to ICSID can opt out if they so choose.
\item See id. art. 42(1). The Convention provides:
\begin{quote}
The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
\end{quote}
\item See id. art. 48(1).
\item See id. art. 54(1).
\item See New York Convention, supra note 57; see also Choi, supra note 218, at 208.
\item See ICSID Convention, supra note 221, art. 52(1) (providing an exclusive list of the grounds on which annulment may be sought). Article 53(1) provides that:
\begin{quote}
The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
\end{quote}
\item Id. art. 53(1).
\end{enumerate}
\end{footnotesize}
Article 54(2) of the Convention declares that a party may obtain recognition and enforcement of an award by simply furnishing a certified copy of the award to the courts of any other State.\textsuperscript{261} The enforceability of the award is nevertheless hindered by the fact that the assets of a foreign State are normally protected by the doctrine of sovereign immunity.\textsuperscript{262} Thus, even though the respondent-State may have assets in another jurisdiction, those assets cannot normally be attached. When seeking to enforce an award, investors thus shop around for States which have more lenient sovereign immunity laws.\textsuperscript{263} Although developing countries seeking to attract foreign investment might waive sovereign immunity and guarantee execution,\textsuperscript{264} making this a requirement would likely meet with resistance. Enforcement will therefore continue to be afflicted by some obstacles.

Although an ICSID award is binding, a party may have the award interpreted, revised, or annulled.\textsuperscript{265} Once a complaint has been raised, the Secretary General of ICSID appoints an \textit{ad hoc} committee of three people from the roster proposed by the States' members, none of whom may have the nationality of the investor or host State. The Committee may stay the enforcement of the award under annulment grounds that include: (1) improper constitution of the tribunal, (2) the arbitrators have manifestly exceeded their powers, (3) corruption of the members of the tribunal, (4) serious departure from a fundamental rule of procedure, and (5) failure to state reasons.\textsuperscript{266}

The scope of the review procedure has been widened significantly by the jurisprudence of these \textit{ad hoc} review committees, causing concern that these committees might develop into appellate courts.\textsuperscript{267} Critics with this concern oppose re-examining the merits of the case because it undermines the panel's authority by preventing \textit{res judicata} of the initial arbitral award.\textsuperscript{268} One scholar in particular has proposed a number of amendments to redress this problem: (1) inserting a presumption

\textsuperscript{261} See id. art. 54(2).
\textsuperscript{262} See id. art. 55 ("Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.").
\textsuperscript{263} See Jacob, supra note 228, at 134.
\textsuperscript{264} Some scholars have pointed out such a possibility. See, e.g., id. at 136.
\textsuperscript{265} See ICSID Convention, supra note 221, arts. 50-52.
\textsuperscript{266} See id. art. 52(1).
\textsuperscript{268} See id. at 761.
in favor of the validity of an award, (2) automatically nullifying an award in the absence of adverse effects on the complaining party, (3) having a formal rather than a substantive test for whether a reasoned decision was rendered, and (4) allowing parties to contract out of review.²⁶⁹

With respect to the objective of ensuring res judicata, the ICSID procedure has also been criticized because procedural impropriety automatically nullifies an award.²⁷⁰ The availability of broad and undefined review invites challenges because losing Parties have nothing further to lose by requesting review of every point. Moreover, only points that have been raised in the application for appeal can be argued to the Committee. This invites Parties to raise as many objections as possible. Numerous reviews render the procedure costly and slow.²⁷¹

Nevertheless, the potential for frivolous abuse would be curtailed if States were to deposit a performance bond with the ICSID when seeking review.²⁷² This ensures that awards continue to be enforceable. Furthermore, Parties in a review lose control of the selection of the members of the panel, which may ultimately render the appeal a less attractive option. Finally, the advantage of consistent decisionmaking may be better realized when the same arbitrators sit on the ad hoc appellate committee.

To date, ICSID has dealt with thirty-eight cases.²⁷³ Five cases have been reviewed since the adoption of the review procedure.²⁷⁴ In three cases, the findings of the initial arbitration panel were set aside.²⁷⁵ The number of appeals may indicate that a losing party will often seek review in order to overturn an adverse ruling.²⁷⁶ Nonetheless, the fact that three requests for annulment were upheld demonstrates that there must have been merit to the requesting Party's assertions.²⁷⁷

²⁶⁹. See id. at 788-805.
²⁷⁰. See id. at 763.
²⁷¹. Interestingly, the Convention provides that if an award is annulled, the dispute shall be submitted de novo to a tribunal at the request of a Party. See ICSID Convention, supra note 221, art. 52(6).
²⁷². See Reisman, supra note 267, at 804.
²⁷³. For a list of pending and concluded cases, see <http://www.worldbank.org/icsid>.
²⁷⁴. See Jacob, supra note 228, at 149.
²⁷⁵. See id.
²⁷⁶. See id. at 150.
4. Evaluation in the Context of the CDM

ICSID is a useful model for disposing of some of the disputes that may arise under the CDM. First, ICSID is among the very few international dispute settlement bodies that provides standing to private parties.\(^{278}\) As disputes between investors and host States will almost certainly arise under the CDM, a tribunal that can address investment-related disputes and the environmental and technical issues under the CDM is essential. However, the small number of cases ICSID has dealt with since its inception suggests that it serves more as a last resort for investors. Thus, ICSID will typically only be used when relations have worsened to the point that conciliation and negotiation between investor and host State are no longer possible. What this suggests is that in most cases, amicably negotiated dispute settlement will remain an effective and acceptable means of resolving disputes. Because ICSID will become the exclusive remedy, it encourages Parties to seek non-binding, negotiated solutions to their disputes before having recourse to ICSID. This feature of ICSID arbitration should be retained because maintaining non-contentious relations between investors and host States is conducive to on-going trade and investment relations.

The ICSID procedure has the advantage of ensuring the investor that some form of binding dispute settlement forum exists, and that the investor will not be required to litigate in the domestic courts of the host State.\(^{279}\) As the CDM contemplates investment in developing countries, this avoidance function may turn out to be important to investors. For the host State, submission to ICSID arbitration enhances its reputation as a host for investment. Non-Annex I Parties under the CDM might be similarly concerned about bolstering their reputation as a locus for foreign direct or portfolio investment and could therefore find ICSID to be an attractive dispute settlement option. Moreover, as a result of the avoidance function, investors no longer must factor in the legal risk premium when making an investment. Investments thus become less costly.

ICSID arbitration is also relatively fast, inexpensive, and flexible, all of which are desirable characteristics of a dispute settlement mechanism under the CDM. The average time to

\(^{278}\) See ICSID Convention, supra note 221, art. 25(1), (2).

issue an award is two and one-half years. The tribunal should normally be constituted 120 days after the filing of a claim, but in practice, it often takes eight to nine months to constitute a tribunal, largely due to the procrastination of the parties. The ICSID fee to the arbitrators is based on the actual cost of the case rather than an *ad valorem* percentage of the total amount in dispute.

Because ICSID prohibits diplomatic protection of the investor, it has depoliticized investment disputes and rendered them subject to legal resolution. The automatic availability of dispute resolution detached from courts has made less risky investment in some countries that lack adequate legal protection. At the same time, ICSID may contribute to avoiding disputes through its deterrent effect on expropriation by the host State and through providing incentives for Parties to settle.

Furthermore, an ICSID award can be enforced in any country. Because the applicable law is that of the forum in which enforcement is sought, however, the investor may not find funds to which sovereign immunity does not apply. The ICSID enforcement mechanism is inept for the CDM. Here, payment of just compensation of the value of the CDM project as an ongoing concern is not likely to make the investor whole. An investor will probably want to include a clause for *lucrum cessans*, the lost profits associated with being deprived of CERs. In contrast to claims of ascertainable prospects of future profitability which are part of the valuation as a going concern, *lucrum cessans* claims are not commonly recognized by arbitral tribunals.

The complications under the CDM are two-fold. First, investors who must meet emission limitations once targets become binding will suffer positive damage if they do not hold enough CERs. Other investors (who are not sources of GHG emissions but finance CDM projects) who speculate that the value of the CERs will appreciate in the future might also not feel sufficiently compensated if lost profits are excluded. Due to the long time between the first CDM projects and the date when emission limitations become binding, any assertions about the

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280. *See id.*
281. *See Rowat, supra note 277, at 121.*
282. *See ICSID Convention, supra note 221, art. 61(2).*
283. *See Choi, supra note 218, at 175-76.*
284. While an agreement to arbitrate is uniformly held to be a waiver of sovereign immunity for the purpose of the arbitration, the waiver does not automatically extend to execution. *See Lowenfeld, supra note 54, at 331-65.*
future value of CERs are, however, inherently speculative.285

Second, and more importantly, compensating the investor does not make good the damage caused to the environment because of the absence of any projects. The project host could be required to purchase additional CERs commensurate with the damage caused or to devise another project. Given that developing countries participate voluntarily in the CDM and that emission limitations are not binding on them, this approach is likely to meet with resistance because it may be viewed as an attempt to force upon non-Annex I countries an obligation to reduce emissions. Moreover, arbitral tribunals do not commonly order specific performance in the way required to rectify environmental damages.

Lastly, ICSID has a synergistic impact on foreign investment. The World Bank insurance fund, MIGA, supports recourse to ICSID for settlement of disputes.286 While ICSID has provided valuable data for MIGA's risk assessment, MIGA has contributed to an upsurge in foreign investment because it provides a form of insurance to investors.287 Its purpose is to provide a gap-filling function to cover risks not commonly covered by private insurance, most notably by including breach of contract loss coverage.288 It also covers risks arising from expropriation, currency transfer, war, and civil disturbance. Thus, ICSID and MIGA are steps toward the creation of a favorable investment climate that could possibly be used in the CDM context.

III

POTENTIAL DISPUTES UNDER THE KYOTO PROTOCOL AND THEIR RESOLUTION: ANNEX I

A. Types of Disputes Under Annex I Trading

The dispute settlement procedures established under the Kyoto Protocol must take into account the different types of disputes that may arise under both the CDM and Annex I emissions trading. One important consideration is that States are not the only potential claimants. Under both Annex I trading and the CDM, disputes may arise between or among Parties, private entities, NGOs, and the C/P Authority (the COP/MOP, Executive Board, and any established subsidiary bodies).

285. See supra note 107 and accompanying text.
287. See id. at 114.
288. See Rowat, supra note 277, at 122.
However, the requirements for a dispute settlement mechanism for Annex I trading are simpler than the requirements for the CDM because certain complications that may arise in a project-based system are absent under Annex I emissions trading. For instance, Annex I trading does not necessitate baseline or additionality determinations, project-based approval, or CER certification, all of which are found under the CDM.\textsuperscript{289}

For purposes of this Article, we envision that within the Annex I trading system (either a cap/allowance system or a budget/savings system), TEUs will be issued by the COP/MOP to the Parties. Each Party will then issue TEUs to its national sources—either public or private entities. Each TEU will allow the holder to emit one ton of carbon or a GHG equivalent during the period for which it is issued or any subsequent period.\textsuperscript{290}

Under a cap/allowance trading system, each State-Party will have the responsibility of ensuring that net emissions from their domestic sources do not exceed the number of allowances held by these sources. In an emissions/budget saving system, a specific level of cumulative emissions would be set for each party for an initial budget period.\textsuperscript{291} Under an emission budget/savings system, each State-Party must ensure that its domestic sources' emissions do not exceed their regulatory emissions budget plus any savings-based TEUs that they hold through national emissions budgets or other regulatory techniques.\textsuperscript{292}

Internationally, Parties will be credited with TEUs held by their domestic entities for purposes of determining their QELRO compliance. Bookkeeping of TEU transfers and holdings (both at the private entity and State levels) and net emissions monitoring may be done by either the C/P Authority or contracted out to private and public entities. Domestic net emissions will be reported to and reviewed by COP/MOP authorities or implementing entities, who will determine Parties' net emissions and QELRO compliance. A strong and reliable system of monitoring, reporting, and verification is particularly vital to ensure the integrity of the trading regime.

The nature and resolution of disputes under the Protocol will ultimately depend upon liability rules adopted by the COP/MOP. Thus, the liability systems adopted under the Protocol will affect who bears the burden of compliance under the regime. For

\begin{itemize}
\item \textsuperscript{289} See supra Part I.B.
\item \textsuperscript{290} The first commitment period is from 2000-2008. Subsequent periods have not yet been established.
\item \textsuperscript{291} See Stewart, supra note 13, at 3.
\item \textsuperscript{292} See id.
\end{itemize}
example, if a party sells tons and emits more than its assigned amount, should the TEUs retain their full value? The answer on whether the seller or the buyer bears this burden depends upon the liability system adopted. Two liability frameworks could be created: seller liability or buyer liability.

In addition, dispute resolution procedures must address the principal disputes that may arise under the Annex I trading system. This Section first discusses possible liability rules, then it analyzes resolution procedures for disputes concerning three types of determinations: (1) emissions monitoring determinations, (2) bookkeeping determinations, and (3) noncompliance determinations and sanctions.

1. Liability Rules

In creating liability rules, the drafters of a dispute settlement procedure should focus on the potential liability parties can expect under Annex I trading. Types of potential liability include the following scenarios: (1) liability under international law of an Annex I Party that has transferred TEUs but has exceeded its QELROs because its net emissions exceed its TEU holdings or its emissions budget plus TEU holdings; (2) liability under international law of a private entity transferor of TEUs where the transferor has exceeded its TEU holdings or its emissions budget plus TEU holdings; and (3) liability of a source under domestic regulatory law that has transferred TEUs issued to it by its government and has emissions exceeding its TEU holdings or its emissions budget plus TEU holdings.

a. Seller Liability

Under seller party liability, TEUs will retain their full value even if the transferring party exceeds its budgeted amount or allowance, and the sellers will bear the burden of the shortage. The following discussion identifies possible scenarios in which TEU sellers could incur liability under Annex I trading.

First, in the situation where Country A, a selling party, directly sells its TEUs and subsequently fails to meet its QELRO, Country A would be liable under the FCCC and the Kyoto Protocol and accordingly, under international law. Although the

294. See id. at 141.
TEU holder would still receive the full value of the TEU, the COP/MOP would require Country A to purchase additional TEUs to make up for its shortage. In the alternative, Country A could receive a reduction in TEUs in the following accounting period equal to the amount that exceeded its QELRO.

A second scenario could arise when Country A allocates TEUs to private domestic entities who then sell the TEUs internationally. If Country A subsequently fails to meet its QELRO either because (1) private domestic entities exceeded their allocated allowances, or (2) there is a more general, structural defect in Country A's domestic regulatory system, then Country A could be held liable under the Protocol. This liability would attach regardless of the underlying reasons for Country A's failure to meet its QELRO. In addition, the private entity seller that exceeded its allocated allowance might also be liable under international law. Nevertheless, who or what entity would enforce such liability remains unclear. Thus, under a seller liability system, the burden of compliance is on the seller; the TEU buyer/holder is protected and therefore has no interest in this regard. Accordingly, it is likely that any enforcement would fall upon domestic governments. Since only States are Parties to the FCCC and the Protocol, States are ultimately responsible for their private entities that transfer TEUs resulting in the State exceeding its QELRO. Reliance on domestic enforcement may be sufficient when private entities operate under the auspices of Parties to the FCCC and the Protocol. In that case, the private entity seller's national government could take action against the TEU seller for overselling (that is, by restricting future ability to participate in trading or imposing fines). However, private entities of non-Parties may also participate in trading. In this case, the private entity would not be participating under the auspices of a national government, and would therefore not be held liable under any domestic regime. Some have suggested the establishment of an international organization that would have enforcement authority against private entities, although this would probably be unacceptable to Parties.\(^{295}\)

\(^{295}\) Most problematic is the likely reluctance by States to be exposed to increased liability. For example, the United States has refused to ratify the Rome Statute which establishes International Criminal Court. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), reprinted in 37 I.L.M. 999 (1998), available at <http://www.un.org/icc/>. The United States' refusal is based primarily on its fears that its own armed forces might be subject to criminal liability. See generally Gerard E. O'Connor, Note, The Pursuit of Justice and Accountability: Why
The downside of the seller liability approach is that total Annex I emissions would be increased. Further, the value of the trade would be unaffected by the possibility of noncompliance of a Party. Therefore, the buyer would face no disincentive to trade with countries that take a less restrictive attitude toward compliance. In other words, buyers would have no incentive to promote strong compliance within the trading regime. Consequently, seller-only liability might encourage weak compliance, undermining the integrity of the trading system. However, if trades are only allowed ex post rather than ex ante, the value of the trade will be assured in all scenarios, since only certified TEUs would be traded.

b. Buyer Liability

Under a buyer liability system, the burden is placed on the party that obtains the TEUs, because traded TEUs either become invalid in the event of noncompliance or are discounted in proportion to the degree of noncompliance by the transferring party. Thus, in the hypothetical discussed above, where a TEU seller (either an Annex I Party or a private entity) has transferred TEUs to another State-Party or a private entity and later exceeds its QELROs, the purchaser's TEUs will decline in value. In theory, would-be purchasers would press for assurances that the transferring States have adequate domestic regulations and monitoring in place to facilitate achievement of QELROs or would seek indemnities, insurance, or other guarantees from private entity transferors.

In addition, under a buyer liability system, the State-Party transferor that exceeded its QELROs would still be liable under international law for noncompliance under the FCCC and the Kyoto Protocol. Further, a private source that exceeded its TEU holdings or emissions budget would be subject to potential penalties under domestic regulations. Thus, the buyer liability approach would promote reliable verification and certification procedures, and necessitate strong and consistent domestic regulations for Annex I Parties that wish to participate in

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296. See Grubb, supra note 293, at 141.
297. See supra Part I.B.
298. See Grubb, supra note 293, at 145. Discounting in proportion to seller's liability has also been termed "shared liability."
299. See discussion of potential noncompliance measures infra Part III.B.3.
trading. The drawback of the buyer liability approach is that it would likely have a chilling effect on the development of a robust international TEU trading market, since the burden would be placed on investors.

B. Dispute Resolution Procedures for Annex I Trading

The choice of dispute settlement mechanism will be determined by the objectives of the Parties to the dispute and the outcomes predicted under different types of dispute settlement mechanisms. Within the Annex I trading system, disputes will most likely relate to net emission monitoring, determinations of TEU holdings, the resulting determination of compliance, and compliance and sanctions issues. The potential range of actors involved in such disputes includes Annex I countries, private entities (TEU holders or claimants), emission monitors (private or public entities established or accredited by the C/P Authority), the bookkeeping entity (private or public entities established or accredited by the C/P Authority), the C/P Authority, and NGOs. Therefore, the settlement of disputes arising out of the Kyoto Protocol and the corresponding liability rules require a framework that will encourage participation and be accessible to both private and public entities.

The discussion below assumes that participants under the Protocol will have a range of non-binding and binding options available to them. Non-binding dispute resolution measures would include negotiation, mediation, and conciliation.300 The binding resolution options available would include: (1) adjudication before a Kyoto Protocol dispute settlement body modeled after either the GATT/WTO panel/Appellate body or ITLOS, (2) adjudication before the International Court of Justice, (3) noncompliance procedures such as those found under the Montreal Protocol, or (4) international arbitration. Table 1 illustrates the potential methods of dispute resolution available under the Annex I trading regime.

300. For purposes of this discussion, we are limiting our analysis to binding options.
<table>
<thead>
<tr>
<th>Issues</th>
<th>Dispute Settlement Procedure</th>
<th>Factors Considered</th>
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<td><strong>Emissions Monitoring</strong></td>
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<td><strong>Determinations</strong></td>
<td></td>
<td>• <em>private sector participation</em></td>
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<td>• States—C/P</td>
<td>(1) International arbitration</td>
<td>• States cannot invoke sovereign immunity</td>
</tr>
<tr>
<td>Monitor</td>
<td>(2) Internal dispute mechanism that allows for private entity</td>
<td>• speed, flexibility</td>
</tr>
<tr>
<td>• Private Entities (NGOs, TEU</td>
<td>participation (WTO Model and standing for private parties)</td>
<td>(2) Private sector participation</td>
</tr>
<tr>
<td>Holders)—C/P</td>
<td></td>
<td>• expertise in Protocol interpretation</td>
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<tr>
<td>Monitor</td>
<td></td>
<td>• unification of law related to protocol</td>
</tr>
<tr>
<td></td>
<td>(1) See factors described in panel above</td>
<td></td>
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<tr>
<td></td>
<td>(2) See factors described in panel above</td>
<td></td>
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<tr>
<td><strong>Bookkeeping Determinations</strong></td>
<td></td>
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</tr>
<tr>
<td>• Annex I States—Bookkeeping</td>
<td>(1) International arbitration</td>
<td></td>
</tr>
<tr>
<td>Entity</td>
<td>(2) Dispute mechanism that allows for private entity participation</td>
<td></td>
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<td>• Private Entities (TEU Holders,</td>
<td>(WTO Model and standing for private parties)</td>
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<td>Claimants)—Bookkeeping Entity</td>
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<td></td>
<td>(1) See factors described in panel above</td>
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<td><strong>Compliance/Sanction</strong></td>
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<td>(1) Montreal Protocol NCP for sanctions</td>
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<td>(2) Dispute mechanism w/private entity participation (WTO Model and standing for private parties)</td>
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<td>• NGOs—C/P Authorities</td>
<td>(3) Private international arbitration</td>
<td></td>
</tr>
<tr>
<td>• TEU Holders—C/P Authorities</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1) Non-contentious range of sanctions</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• <em>promotes goodwill among States</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• <em>flexible</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(2) See factors described in top panel above</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(3) See factors described in top panel above</td>
<td></td>
</tr>
</tbody>
</table>
1. Emissions Monitoring Determinations

Disputes between either Annex I countries or private entities and C/P monitors may arise over the validity of emissions monitoring determinations. For instance, an Annex I country or private holder may challenge the level of emissions reported by the monitor. NGOs may also challenge findings by emission monitors, possibly claiming that emission levels are actually higher than determined. The methodology used for emissions monitoring could also be a topic of challenge. Since emission monitoring responsibilities are likely to be delegated by the C/P Authority to private or public entities, disputes concerning the validity of emission monitoring determinations could occur between public or private entities, or a combination of both. Therefore, the dispute mechanism should allow for the inclusion of private actors.

a. Disputes Between Private Entities and Emission Monitors

For disputes that arise between private entities and emission monitors, the most appropriate mechanism would include private parties that participate in activities under the Kyoto Protocol. Since private parties usually do not have access to international treaty regimes, fora such as the ICJ and the GATT/WTO panels would not be suitable. As discussed in further detail below, disputes involving private parties would be best resolved through private international arbitration or through the creation of an internal dispute settlement mechanism within the Kyoto Protocol.

While the ICJ is one potential forum for dispute resolution, it is a poor fit given the needs of the Kyoto Protocol. Although private parties (domestic TEU holders and NGOs) are expected to play a major role under the Kyoto Protocol, they are not "Parties" to the Protocol, and the C/P Authority presently has no codified relationship with the private sector. The FCCC provides that Parties may choose to submit their disputes through compulsory jurisdiction to the ICJ and/or arbitration. However, the ICJ's jurisdiction in contentious cases is limited to disputes among States, thereby excluding dispute settlement opportunities for matters involving corporations, NGOs, and intergovernmental

301. See infra Part III.B.3.a.
302. See FCCC, supra note 6, art. 14.
organizations. Without an amendment to its statute, the ICJ will not be able to hear disputes on many of the matters expected to arise under the Kyoto Protocol.

Traditionally, the only fora available to disputing private parties and foreign governments have been either adjudication in domestic courts or international private arbitration. Realistically, adjudication in domestic courts is not a viable solution for disputes involving the validity of emissions determinations under the Kyoto Protocol. Adjudication by domestic courts is not feasible due to State immunity or the court’s inability or unwillingness to apply international law. National court systems may fail to provide a neutral forum for the settlement of investment related disputes. In situations where a national government enters into a contractual relationship with a private party, governments are usually unwilling to waive sovereign immunity or other related privileges, leaving the private entity without a remedy.304

Since domestic courts and the ICJ would not adequately serve the interests of private parties, private arbitration remains an option as a dispute resolution forum. As discussed earlier, arbitration offers the advantages of speed and flexibility, and it addresses the Parties' inherent distrust of adjudication in foreign courts.305 The arbitral tribunal evaluates the controversy according to the rules of law adopted by the Parties, and the Parties can choose the members of the tribunal. This allows the private Parties greater control and autonomy over the dispute resolution process. In addition, when a national government or agency is a Party to arbitration against a private entity, it cannot invoke sovereign privileges and immunities. If an agreement between the two Parties cannot be reached, the tribunal applies the law of the contracting State that is a Party to the controversy.

Nevertheless, while private arbitration is an option for disputes between private parties, it is not well-suited for disputes involving the interpretation of technical Protocol provisions. Instead, an internal dispute mechanism, designed specifically for the Protocol’s provisions and goals, would be a more appropriate forum for emissions monitoring disputes. In addition, it is highly desirable that a uniform body of precedent regarding monitoring disputes develops to guide future decisions. Accordingly, the most amenable forum for these disputes would be a new entity

305. See supra Part II.F (discussing ICSID).
within the Kyoto Protocol dispute settlement regime that would allow access to claims and disputes involving private entities.\textsuperscript{306}

Such a forum could be modeled after the GATT/WTO settlement process, but would also allow standing to private Parties that are active participants in the trading regime. Guidelines could be set forth detailing the type of private entity involvement that would allow access to the Protocol's dispute settlement processes. This "Kyoto Protocol Panel" would be limited to interpreting and applying the provisions of the Kyoto Protocol, providing expertise in Protocol interpretation. One benefit of this approach is that the Kyoto Protocol Panel would have the specific technical knowledge and expertise to deal with the more complicated issues arising under the Protocol, as well as to shape law and policy in a consistent direction.

\textbf{b. Disputes Between Annex I Countries and Emission Monitors}

Disputes concerning the validity of emissions determinations may also occur between Annex I countries and emissions monitors (public or private). If the emissions monitor is the C/P Secretariat, the most appropriate dispute settlement mechanism would be designed under the Kyoto Protocol.\textsuperscript{307} Unlike private parties, Annex I Parties already have access to the Protocol dispute settlement mechanism. Further, the body established under the Protocol would have the technical knowledge required to make an informed decision. On the other hand, if emissions monitoring responsibilities are contracted out to private or public entities, such entities would lack access to a traditional dispute settlement mechanism. Therefore, such disputes would be best served through a Kyoto Protocol Panel.

\textbf{2. Disputes Concerning Bookkeeping Determinations}

Dispute issues that arise under bookkeeping determinations are parallel to dispute issues that arise under emission monitoring determinations.\textsuperscript{308} These disputes could involve

\begin{footnotesize}
\begin{enumerate}
\item Human rights tribunals have opened the door in this area, providing direct access to individuals. Pursuant to Article 25(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, a State-Party may recognize the competence of the European Commission on Human Rights to receive petitions by individuals. \textit{See} European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 28-37, 213 U.N.T.S. 221.
\item The dispute settlement mechanism under the Protocol has yet to be established. \textit{See} Kyoto Protocol, \textit{supra} note 2, art. 16 (noting that the dispute settlement mechanism in the Protocol should be established as soon as possible).
\item \textit{See supra} Part III.B.1 (discussing disputes that may arise concerning
\end{enumerate}
\end{footnotesize}
protests over the validity or the methodology of determinations. The C/P Authority itself may either manage the bookkeeping of TEU transfers and holdings, or contract out such responsibilities to private and/or public entities. Thus, the principal disputes regarding validity and methodology of determination would be between (1) Annex I countries and the C/P or private/public bookkeeping entity; or (2) private entity TEU holders and the C/P or a private/public bookkeeping entity.

For disputes between Annex I countries and the C/P bookkeeper, the most appropriate dispute mechanism would be a body designed pursuant to the Kyoto Protocol. Another alternative for disputes between Annex I countries and the C/P bookkeeper would be an appeal to the C/P Secretariat or Executive Board. Where the bookkeeping entity is a private entity, or the dispute involves private entity TEU holders who lack standing before the Protocol dispute settlement mechanism, dispute settlement could be achieved through international arbitration or through a Kyoto Protocol Panel, as described above.

3. Disputes Concerning Noncompliance Determinations and Sanctions

Disputes related to noncompliance and resulting sanctions that may arise include at least four possible scenarios: (1) among Annex I countries, where Annex I Parties are concerned about another Party's noncompliance; (2) between Annex I countries and C/P Authority, where the C/P Authority initiates noncompliance proceedings and/or imposes sanctions on the noncompliant Party; (3) between NGOs and C/P Authority, if the Authority fails to enforce Protocol provisions in relation to violations; and (4) between private TEU holders and the C/P Authority for objections to sanctions imposed or other compliance issues.

a. Noncompliance Issues

Within the emission trading regime, disputes may arise if a Party or a private entity transfers TEUs, and the Party subsequently fails to achieve its QELRO. Under a seller liability

emission monitoring determinations).

309. See supra Part III.B.1.b (discussing access to the Protocol dispute mechanism and technical knowledge).
The transferor party would remain responsible for obtaining TEUs on the open market to make up for its excess emissions or, alternatively, receive a deficit of TEUs in the following accounting period equivalent to the surplus emissions. The holder's TEUs would retain their value, and there would be no cause of action against the noncompliant Party or its private entities. Nevertheless, the transferor party could be subject to domestic liability as a consequence of noncompliance, as well as potential liability under international law. Therefore, the transferor party might challenge the determination of noncompliance.

Under a buyer liability system, the holders' TEUs would be either rendered valueless or depreciated to the degree that the seller exceeded its budgeted amount. The TEU holder would most likely dispute the determination of noncompliance by the C/P Authority. If the TEU holder is a private entity of an Annex I Party, that Party might also dispute the noncompliance determination, because under a buyer liability rule, that Party might be required to obtain TEUs or reduce domestic emissions in order to achieve compliance with QELROs.

Where both disputants are State Parties, all four dispute resolution models (Kyoto Protocol dispute mechanism, ICJ, private international arbitration, and Montreal Protocol) would be available. Since both disputants would be Parties to the Protocol, they would have already expressed their commitment to the objectives of the treaty, and would most likely be willing to accede to adjudication under the body established pursuant to the FCCC and the Protocol. Since it would be handled internally, resolution through a body established under the Kyoto Protocol or by submission to the Executive Board would be more confidential than proceedings before the ICJ. The Kyoto Protocol Panel could combine positive aspects found under the Montreal Protocol, GATT/WTO, or UNCLOS.

Similarly, an internal dispute mechanism modeled after GATT/WTO dispute settlement procedures would be the most appropriate forum for disputes that arise between Annex I Parties and the C/P Authority. As discussed above, such disputes arising from challenges by Parties to noncompliance

310. See infra Part III.A.1.a.
311. See infra Part III.A.1.b.
312. See infra Table 4. Some of these positive factors include a choice of forum, binding resolution, private party participation, and an informational dispute resolution process.
313. See supra Part III.B.3.a.
decisions made by the C/P Authority could best be handled through an internal mechanism. In addition, a GATT/WTO-like dispute mechanism may be less political than a process that involves appeal to the Executive Board.

Private international arbitration remains one dispute settlement option for disputes between non-Parties (such as NGOs and TEU holders) and the C/P Authority. Private entities—as well as the C/P Authority—may not want to bring their dispute to the unknown arena of an international tribunal, but may instead prefer private arbitration where they would have more control over the issues and selection of judges. On the other hand, disputes concerning compliance would likely involve technical issues related to interpretations of the Protocol, and the body established under the Protocol would have the technical knowledge required to make a more informed decision. Also, consistency in the evolution of law and in the implementation of the Protocol would be highly desirable. Therefore, a Panel established under the Protocol that allows for the inclusion of private entities would be an appropriate mechanism for noncompliance disputes that involve both the private and public sectors.

b. Sanctions

Sanctions imposed by the Kyoto Protocol dispute settlement body could be modeled on those provided under the Montreal Protocol's NCP. The Montreal Protocol's NCP is considered less contentious than other dispute settlement processes because the Secretariat, assisted by the allegedly violating Party, determines whether the Party can comply with its obligation. Further, the Secretariat attempts to secure an amicable resolution to bring about compliance. Information gathering in that Party's territory is done only at the invitation of the Party concerned.

Presumably, under the Kyoto Protocol, sanctions would be recommended or imposed by the Executive Board, with a final decision made by the COP/MOP—or more likely, a subset of the COP/MOP similar to the Montreal Protocol's Implementation Committee. Such sanctions might include: (1) issuance of cautions to those in noncompliance; (2) suspension of specific rights under the Protocol, including the ability to participate in Annex I trading; (3) automatic rollovers for failing to meet

314. For a detailed discussion of the Montreal Protocol's NCP, see supra II.E.
315. See id.
QELRO commitments where the extent of under-compliance could be deducted from a subsequent commitment period with a penalty as a percentage of the non-complying Party's assigned amount;\textsuperscript{316} and (4) financial penalties. Positive sanctions might include providing technical and financial assistance to enable a Party to meet its Protocol obligations.

Finally, other mechanisms may be established to address the issue of "overselling," or selling more TEUs than one actually has. First, a grace period or a "true up" time at the end of the commitment period would allow Parties to come into compliance by acquiring needed TEUs. Commentators have suggested the creation of a "compliance bank" by the COP/MOP to be held until the end of the first commitment period, when noncompliant Parties could borrow or purchase TEUs at a high premium. Another option is to provide risk insurance, where insurance companies acquire a portfolio of TEUs and insure holders against over-selling by TEU sellers. Similarly, the Protocol's C/P Authority could act in the same capacity through the establishment of an insurance fund.

For Annex I Parties, sanctions and procedural mechanisms imposed by the Protocol's dispute settlement body would be preferable to litigation before the ICJ for reasons of confidentiality, less publicity, and the ability of the sanctioned Party to have input into the sanction process.

IV
POTENTIAL DISPUTES UNDER THE KYOTO PROTOCOL AND THEIR RESOLUTION: CDM

A. Types of Disputes Under CDM

The creation of an investment relationship and issuance of CERs under the CDM will likely proceed in various stages.\textsuperscript{317} Initially, the project sponsor and investor will enter into negotiations regarding a potential project. Eligible projects might include both governmental infrastructure-type projects and projects by private parties that reduce GHG emissions. Projects to be financed will have to be approved by the developing country in which the project will be established. In addition to host country approval, projects will also require the approval of the

\textsuperscript{316} A second commitment period is not yet agreed upon; therefore, the possibility of borrowing may provide an incentive for negotiators to inflate the second commitment period's budget. See Werksman, supra note 37, at 30.

\textsuperscript{317} See Kyoto Protocol, supra note 2, art. 12.
CDM authority and subsidiary entities. Projects that comply with the relevant rules and regulations under the CDM, including determinations of baselines, additionality, and sustainability, would be scrutinized. At this stage, CDM authorities or delegated agents would become involved in the investment relationship.

Once the project starts producing emission reductions, ex post certification and contemporaneous issuance of credits enhances the fungibility of CERs and promotes certainty that credits, once certified, will not be revoked later. Registration of a project would occur only when the project meets the CDM criteria. Verification through on-site inspection would ensure that projects actually achieve the stated emission reductions. Subject to approval of the project by the CDM authorities, CERs can then be issued to the investor. Once CERs are issued, the CDM authorities will maintain bookkeeping operations to guarantee that no excess credits are transferred under a particular transaction. A vintaging system of CERs should be established. Under this approach, the origin of the credit and identity of the investor would be attached to the credit itself in order to allow tracking. A vintaging system would be particularly useful if the credits were certified ex ante. If the credits were found invalid, vintaging would allow for easy identification of the liable Party. Vintaging would also facilitate bookkeeping because the origin of a credit could be traceable. Transfers and holdings may have to be audited to ensure the correctness of the trading system and of ultimate compliance determinations, which must take into account CER holdings and their attribution to Parties.

In spite of a strong certification process, the possibility would remain that issued CERs would be found invalid. CERs might have to be decertified because of monitoring errors. For example, complex CDM projects such as the production of low-

318. See id. arts. 12(2), 5.
319. See id. art. 12(7).
321. See Kyoto Protocol, supra note 2, art. 12(7).
323. See generally John Lanchbery, Verifying Compliance with the Kyoto Protocol, 7 RECIEL 170, 171-72 (1998). This possibility for error exists despite ex post certification of credits, fostering the integrity of the CDM system and providing a check on the validity of the credits.
fuel or non-CO₂ fuel cars are susceptible to erroneous measurement and calculation. The amount of reductions from such a project would involve a complex determination based on the total sales of these cars and fuel-consumption patterns. Determining the amount of CO₂ and non-CO₂ emissions on a by-source basis (cars, factories, households) is thus prone to error. In such a case, CERs might need to be revoked and a liability determination made. Leakage from a neighboring activity with GHG emissions can also distort the measurement of emission reductions generated by a CDM project.

A variety of disputes might arise under the CDM. First, disputes might arise out of the investment relationship, including disputes over the failure of a project due to the fault of the host State or joint venture partner. These disputes will often be similar to the disputes arising under any international investment contract. The joint venture partner might fail to perform under the investment agreement or the host State might expropriate the investment. Investment disputes such as these, however, can also implicate provisions of the Kyoto Protocol in those cases where the host State argues that a project does not contribute to sustainable development.

Second, potential disputes over the registration of projects and issuance or revocation of CERs could develop. These disputes might involve the investor, project sponsor, and host State against the CDM umbrella authority and those entities to whom certification and verification functions have been delegated. It is, however, also possible that NGOs and other Annex I Parties may challenge the registration and certification decisions, and question the rationality of the standards and regulations used under it.

A third set of disputes is likely to focus on the auditing and bookkeeping decisions. A foreseeable scenario is that parties to a CDM project might want to review a decision that CERs were wrongly transferred, or that their existence was fraudulently misrepresented in the corporate books.

Fourth, it is likely that a significant amount of the CDM functions will be contracted out to private bodies. Disputes might thus arise with regard to decisions of whether to accredit or decredit certain bodies under the CDM.

Fifth, disputes can arise when credits are retroactively held to be invalid. Here, again, suits might be brought at the instigation of plaintiffs that did not initially participate in the investment such as other Annex I Parties or even NGOs. The disputants involved will depend in large measure on the
operative provisions of the CDM. Operative provisions include the way in which the transfer of credits occurs, verification processes, and the adopted liability rules. The involvement of various disputants can be matched with the types of dispute resolution processes that will be most adequate. Table 2 illustrates potential disputes that may arise under the CDM.

**TABLE 2**

**POTENTIAL DISPUTES ARISING UNDER CDM**

<table>
<thead>
<tr>
<th>Potential Parties to Disputes Under the Kyoto Protocol</th>
<th>States in their capacity as host countries of a project or project developer in host country</th>
<th>Private entity that fulfills registration, certification, auditing function</th>
<th>C/P Authority</th>
<th>CDM Implementing Entity (Verifiers)</th>
</tr>
</thead>
<tbody>
<tr>
<td>States in their capacity as host countries of a project</td>
<td>N/A</td>
<td>objections over registration, certification, and application of Protocol provisions</td>
<td>objections regarding preapproved list of projects</td>
<td>objections to verification decisions/certidation (depends on liability regime)</td>
</tr>
<tr>
<td>NGOs and other Annex I countries as third parties</td>
<td>nonfulfillment of the Protocol's objectives by CDM project</td>
<td>application of provisions of the Protocol to certification, later guidelines; accreditation of private bodies</td>
<td>application of provisions of the Protocol to certification, later guidelines; accreditation of private bodies</td>
<td>failure to apply provisions of Protocol correctly in verification of CERs</td>
</tr>
<tr>
<td>Investor (interest of foreign project developer may be aligned)</td>
<td>failure of CDM project to obtain projected future credits (this may be due to expropriation or fault of foreign project developer)</td>
<td>certifcation of emission reductions, project registration, auditing, disputes that also involve insurance fund concerning subrogation</td>
<td>later guidelines regarding project registration and certification, validity of certifications, bookkeeping and auditing decisions, accreditation of private entities, *C/P insurance fund</td>
<td>objections to verification decisions and certification (depends on liability regime)</td>
</tr>
</tbody>
</table>

1. **Project Registration, Verification, and Certification of CERs**

Disputes over the process of registering projects, as well as certifying and verifying CERs, are likely to arise under the CDM. Both host States and project proponents might wish to challenge a decision not to register a project or certify and verify CERs. The role of CDM authorities may also be subject to dispute. This role includes providing general oversight to the private certification entities and auditors, as well as ensuring the uniform application of the CDM eligibility criteria.\(^{324}\) In addition, NGOs

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324. See Kyoto Protocol, supra note 2, art. 12(4).
should have legal recourse to challenge a decision to register a particular project or a decision to certify and verify CERs. Many international NGOs have sufficient resources to supplement monitoring, while domestic NGOs possess the geographical proximity to projects to be able to adequately monitor the quality of the certification bodies.\textsuperscript{325} Allowing NGOs to challenge decisions may increase monitoring and the integrity of the entire process.

Therefore, \textit{ex post} certification reduces the number of disputes over whether projects have or have not generated emission reductions. In contrast, \textit{ex ante} certification relies on forecasts of how many credits a project will earn. A robust certification process reduces the need for extensive dispute settlement between investors, project proponents, and host States. An additional check on the decision to certify an emission reduction can be placed on the certifying entity through the verification process, which is essentially a review of the certification body. Legal challenges to decisions by the certification entities will therefore involve verification bodies. As a consequence, the number of interagency disputes will rise. However, liability for monitoring errors under \textit{ex post} liability provides a powerful incentive for certifying entities to improve their own certification performance, since liability depends almost entirely on their own actions. In contrast, under the \textit{ex ante} approach, liability for both investors and project proponents may often be incurred by the fault of the other party. Therefore, liability has less of an inducement effect. In summary, the number of disputes under \textit{ex post} liability is likely to be smaller than under \textit{ex ante} liability. This further suggests that disputes between verification and certification entities are easier to resolve than investor host State disputes.

Decisions regarding the registration of projects and the certification and verification of CERs will most likely involve detailed factual and technical questions. A form of administrative or quasi-judicial review available to project sponsors and hosts might therefore be needed. In addition, if certification bodies are to be subjected to any form of liability, a review of verification decisions could prove essential. In light of the technical nature of disputes over certification and verification, it is necessary to entrust their resolution to a body sufficiently expert to evaluate technical evidence.

\textsuperscript{325} See Barratt-Brown, \textit{ supra} note 187 (arguing that NGOs can play an important role in supplementing monitoring and compliance).
2. Liability Rules Under Ex Ante Certification

Where projects fail to generate the expected level of emission reductions, liability rules must be developed to allocate risks and to hold parties responsible for remedying the shortfall. Care should be taken so that liability rules do not undermine the commodity nature of credits by allowing for retrospective devaluation. There are three models for adopting an ex ante approach: (1) project proponent liability, (2) investor liability, and (3) shared liability. In any model, liability could either be assigned through the investment contract, ensuring that the party with greater control over the project assumes liability, or liability could be subject to guidelines issued by the COP/MOP.

a. Project Proponent Liability

Under the project proponent liability approach, in the event that CERs certified ex ante were later invalidated, project proponents would be required to buy additional credits on the market or to develop alternative projects that achieve valid credits. This liability system reduces uncertainty and risk to the investor and enhances the fungibility of credits. That is to say, once the investor has committed capital to the investment, he is guaranteed to receive CERs in return and is then able to assign them immediately, including in futures contracts. Subsequent purchasers do not have to fear that the CERs would be revoked.

This approach to imposing liability, however, is complicated by several factors. First, because investor and project proponent share a common interest, namely, ensuring that either side receives their return under the investment agreement, neither are likely to reveal that a project did not achieve the stated emission reductions. Second, neither the non-Annex I host country nor the project proponent resident in the host State are subject to emission reduction targets. Requiring project proponents or the host country to purchase additional credits on the market or to develop another project might simply lead to the withdrawal of the developing countries from the CDM given that their participation is voluntary. Imposing liability on the project proponent of the host country is also difficult where the investor retains control and majority ownership over the project.

326. See Kyoto Protocol, supra note 2, art. 12.5[a].
b. Investor Liability

Investor liability will allocate any liability for failure to achieve emission reductions to the investor or investors. Under this system, the investor will be held liable for the shortfall in emission reductions as compared to the amount a project was supposed to generate. The investor would then have to purchase additional credits in the market or create another project in the non-Annex I country. This system has the advantage of deterring subsequent trade in false or tainted credits because an investor faces double liability. The investor will have to make up for any overstated credit balances; further, any buyer of the credits will have a claim against the investor.

Invalidated CERs could also be subject to _pro rata_ discounting, that is, those credits earned last in exchange for investments would be subject to proportionate discounting. This approach is particularly attractive where there are multiple investors in a CDM project. Investors would therefore be expected to increase the number of emission reductions or else face discounting. Under a proportionate reduction model, liability would be imposed on all holdings of CERs. For example, if there were one hundred CERs issued for a given year but there were only eighty emission reductions, a twenty percent deduction would be imposed on all CERs.

While it is clear that investor liability would lead investors to push for adequate monitoring, it might deter them from making investments. More difficult problems arise in relation to the secondary market. In other words, if CERs are fully fungible and can be traded like TEUs, an investor would be able to sell CERs to other buyers who hold CERs either to comply with applicable domestic GHG emission limitations or as a speculative investment. A regime for addressing trade in false credits would have to be devised. Similar to counterfeit money, false CERs will have to be taken off the market and substituted for valid CERs. Holding purchasers liable might be

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327. See also Grubb, supra note 293, at 62 (discussing this model for compliance under the Kyoto Protocol generally).
328. See _Cooperative Mechanisms Under the Kyoto Protocol_, supra note 322.
329. For a discussion of the various types of liability rules under _ex ante_ certification, see Grubb, supra note 293, at 141.
administratively convenient but serves no useful purpose. Because of their removal from and lack of control over the CDM investment, liability will neither induce increased monitoring efforts nor appear to the purchasers as equitable. Moreover, because the buyer lacks control over the CDM project, the price of the CERs will have to be discounted to reflect the risk of decertification of CERs. This risk is exacerbated because the investor might be bankrupt or untraceable. In such a case, the buyer would be unable to recover his money.

Consequently, the better option is for the CDM to register all trades in CERs to allow tracking or to develop a full-fledged vintaging system according to which the origin of a credit would be attached to the credit. While registering all trades may be unduly burdensome and expensive because it requires an inflated international bureaucracy, a vintaging system ensures that fraudulent CERs are simply cancelled, and the investor is required to purchase valid CERs or invest in another CDM project. Buyers could then exchange their revoked CERs for new, valid CERs. In this fashion, risk in the secondary market is reduced. In addition, a liability determination in the event that there are multiple investors would be facilitated because joint and several liability can be imposed easily.

c. Shared Liability

Under a shared liability approach, CERs in excess of emission reductions are discounted, possibly in proportion to the fault of the host or investor. For example, if emission reductions fell short twenty units of CERs, liability would be assigned among investor and project sponsor in proportion to their stake in the project. Thus, the CERs held by the investor would be reduced by an amount equivalent to the stake in the project, while some financial liability would also be imposed on the project proponent. Leaving the choice over the assignment of liability to the parties through a modification of their stakes in the investment is also more consonant with business practice. Thus, if the risk is too great in proportion to the shareholding, the investment would not be made. As a result, investors would be pushed to invest in projects with greater marginal efficiency in

332. See id.
333. See Grubb, supra note 293, at 141.
334. For a discussion of the various types of investments, see Stewart, The CDM, supra note 25, at 22-37.
real terms, that is, after adjustment for risk. Of course, such a model presupposes moderate scarcity of CDM projects.

3. Liability Rules Under Ex Post Certification

If, as is likely, a system of *ex post* certification were adopted,\(^{335}\) only CERs that have been certified as valid would be transferred to the investor.\(^{336}\) Once a project is registered, investment would occur. Therefore, an interim risk lies with the investor until credits are certified. The investor will have invested the money into the project but the return on the investment, in the form of CERs, remains uncertain until the CERs have actually been generated. In some cases, this risk could prove to be a deterrent to making an investment or requiring a reduction in price commensurate with the risk involved. Such a risk is similar to risks in other international project finance and is routinely addressed by taking out insurance policies, hedging, and investor-project proponent arbitration clauses. Once certified, CERs would be deemed valid. As a result, it seems logical for the certifying entity to assume the liability for the possibility of decertification.

Such an approach offers a number of advantages. Once certified, CERs would become a full commodity. Moreover, because liability lies with the certifying entities, incentives would be created for the stringent application of criteria issued by the COP/MOP. This may reduce the possibility of monitoring errors because certifying entities are induced to take greater precautions. As a corollary, the number of disputes over decertification may be smaller.

If the certifying entities are primary risk bearers, they should have a right of action against a fraudulent project sponsor. In the event of willful misrepresentation by the sponsor, it would be unfair to impose liability on the certifying entity. The creation of a tribunal with standing for private parties would provide a forum in which claims by the certifying entities could be litigated.

If the certification entities were themselves at fault for the decertification of CERs, they might similarly be required to purchase real CERs on the market or to make a financial contribution to CDM projects to remedy the environmental losses suffered as a result of the decertification. To mitigate this risk, a

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\(^{335}\) For proponents' views of an *ex post* certification approach, see *id.* at 7.

\(^{336}\) See *id.* at 9.
form of insurance should be taken out by the certifying entities with contributions from the investor and project hosts in return for the certainty obtained. Part of this insurance might be provided through the private insurance market. For risk to which private insurance coverage does not extend, an insurance fund similar to the MIGA could provide a gap-filling function.\textsuperscript{337}

The advantages of an insurance-based system are twofold. First, because of \textit{ex post} certification with liability of the certifying entities, the full commodity nature of CERs can be guaranteed. Second, because all uncertainties and risks in conjunction with certification and decertification (especially monitoring and measurement of emissions) are severed from the investment decision of the investor and host, CDM projects more closely resemble international project finance contracts in which only standard risks (such as the danger of expropriation) obtain and for which insurance is available. Therefore, transaction and information-gathering costs for investors in the CDM are reduced, which is likely to result in uninhibited cross-border financing.

Ultimately, the issue of full insurance coverage of the certifying entities will have to be addressed. Full insurance coverage is typically associated with moral hazard problems. For example, decertification can arise as a result of monitoring errors or misrepresentations of the project proponent. In such instances, insurance coverage would protect the certifying entities. Full coverage reduces the incentive of certifying entities to monitor adequately because they do not face the consequences of their errors. Further, investor and project-proponents have greater incentives to commit fraud, knowing that they will not be held liable. This dilemma can be addressed by subrogation. If project proponent, investor, and host State are required to pay insurance premiums, and those premiums are directly linked to the project, then they would have an interest as payors in challenging the certification determination. Such disputes are therefore similar to disputes regarding the application of criteria for certification in general and can be resolved by a dispute settlement mechanism that allows for standing of private parties.

4. \textit{Allocation of CERs to Parties}

According to present proposals, it appears likely that a

\textsuperscript{337}. \textit{See} Rowat, \textit{supra} note 277, at 127.
system of _ex post_ certification will be adopted for the CDM.\textsuperscript{338} Thus, only credits already generated will be transferred to the investor. Two issues will need to be resolved. First, parties will have to decide when CERs are to be transferred to the investor and how those CERs will subsequently become available to the Annex I Party to meet emission limits. Once QELROs become binding, early credits earned under the CDM will have to be taken into account to determine the net emissions of an Annex I Party.\textsuperscript{339} The second issue then becomes when and how CERs, held by investors, will be assigned to Annex I Parties who will bear the overall liability of meeting the emission reductions established by the Kyoto Protocol. One commentator has suggested making investor States adopt the investment and resultant credit through, for example, purchasing the credit from a private investor.\textsuperscript{340}

**B. Dispute Resolution Procedures for CDM Disputes**

The following Section analyzes the dispute solution models of the previous section with a view to determining their suitability for the disputes just outlined.

1. **Challenges by Investors, Project Host Countries, Project Proponents, and CDM-Accredited Entities over Non-Recognition of CERs and/or Registration of a Project**

Certain disputes are likely to involve challenges to a decision not to register a project or not to certify CERs. Parties to such disputes will be investors, project sponsors, and host countries against the entities accredited under the CDM to undertake the certification of CERs and approval of projects. The challenges are likely to center around either factual determinations by the entity or the correct application of the CDM guidelines concerning the registration of project and certification of CERs. The relief likely to be sought will be judicial review of the decisions by administrative authorities. Unlike in domestic proceedings, these disputes involve both private and State entities. A dispute resolution mechanism will therefore have to provide for recourse by both these entities. Such a dispute

\textsuperscript{338} See Stewart, _supra_ note 25, at 7.

\textsuperscript{339} See Kyoto Protocol, _supra_ note 2, art. 12.10.

\textsuperscript{340} See Tom Tietenberg et al., _International Rules for Greenhouse Gas Emissions Trading_, at 45-47. UNCTAD/GDS/GFSB/Misc.6 (1999). A similar problem obtains with respect to the allowance trading system. Under existing allowance trading systems, allowances are normally allocated to private sources for free.
settlement mechanism will also need to achieve uniformity and consistency in the application of criteria developed under the auspices of the COP/MOP.

The only dispute resolution procedures that provide standing for both private and public entities are ITLOS (the Sea-Bed Disputes Chamber under UNCLOS) and the ICSID arbitration board. Furthermore, dispute settlement under the Montreal Protocol is premised on a multilateral process of adoption by State representatives, ill-suited to deal with technical questions arising out of a determination whether or not to certify a project.

In contrast, a mechanism modeled after the Sea-Bed Disputes Chamber is well-suited. The adjudicatory body is small enough to provide the necessary expertise to assess disputes over the registration of projects. It also allows private contractors to bring suit. Moreover, the decisions of the Sea-Bed Disputes Chamber are enforceable as decisions of the highest court in that country. They therefore provide a remedy against parties situated in another State. Because the Sea-Bed Disputes Chamber allows for the appointment of experts, it presents a more suitable dispute settlement mechanism for the CDM than ICSID. Like ICSID, the Sea-Bed Disputes Chamber also provides for standing of private parties. Broadening the range of entities that can have recourse to the dispute settlement chamber is of particular importance for the CDM because developing parties are not party to the Kyoto Protocol but might be involved in disputes over CDM projects. Also, as has been pointed out above, NGOs often possess the type of information relevant to assessing the environmental protection CDM projects achieve. Thus, it is desirable for the integrity of the CDM for parties with relevant information to have a role in the adjudication of disputes.

There are two drawbacks to the Sea-Bed Disputes Chamber’s settlement procedure. First, it allows for choice among decisionmaking bodies. While choice over the adjudicatory body is more acceptable to States and to private parties in international private arbitration, the process might produce inconsistent decisions. This is likely to encourage forum-shopping. Second, it lacks an internal appeals procedure. Many disputes over the application of CDM criteria to projects can

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341. See infra Part II.D for a discussion of these dispute settlement mechanisms.
342. See infra Part I.E.
343. See infra Part II.d.4 for a discussion of the Sea-Bed Disputes Chamber.
344. See Stewart, The CDM. supra note 25, at 47.
likely be resolved more quickly, cheaply, and less controversially through an internal appeals procedure, rather than by the formal judicial review of an administrative decision.

Thus, whereas choice over the composition of the dispute settlement chamber is important to disputants, extensive choice entails the risk of inconsistent decisionmaking, which threatens the authority of an international regime. In this regard, the WTO's Dispute Settlement Body strikes a better balance between flexibility and choice over the adjudicatory tribunal. While parties to a dispute can choose the panelists at the first stage of the dispute settlement process, choice over the tribunal is lost at the appeals stage. If a model like the Sea-Bed Disputes Chamber that allows extensive choice over the tribunal were to be adopted, a review body with a fixed composition of judges should be available. As outlined above, only such a standing body has the requisite credibility and permanence to build up case law.

The WTO Dispute Settlement Body also ensures a measure of expert decisionmaking because the panels can receive expert evidence and appoint their own experts. Such a mechanism might, however, prove insufficient insofar as appeal to the Appellate Body only lies on questions of law. This might need to be modified in light of technical questions that may arise with respect to decisions about project registration and certification.

2. Challenges to Registration and Verification Standards, and Procedures by Parties, Investors, Sponsors, and NGOs

The COP/MOP will have to establish further guidelines for the registration of projects and the certification and verification of CERs. Article 12.4 of the Kyoto Protocol provides them with a clear mandate to do so for the CDM. The COP/MOP is given a similar mandate for activities implemented jointly in Article 6.2 of the Kyoto Protocol. In both instances, it is possible that Parties, investors, sponsors, and NGOs might challenge the rationality of the standards or the procedure used to determine eligibility of projects or certification of emission reduction units. It is possible, for example, that NGOs will challenge the

345. See DSU, supra note 71, art. 13(1), (2).
346. See id. art. 17(6).
347. See Kyoto Protocol, supra note 2, art. 6.2 ("The conference of the Parties serving as the meeting of the Parties to this Protocol may, at its first session or as soon as practicable thereafter, further elaborate guidelines for the implementation of this Article, including verification and reporting."). These "activities" are CER generating projects between Annex I parties. See id.
standards developed as environmentally unsound. A tension arises regarding the most satisfactory forum for resolution of such a challenge. On the one hand, the Party, investor, or NGO would probably prefer to have recourse to a body that is independent of entities associated with the COP itself. On the other hand, since the Executive Board is expressly vested with the authority to adopt further guidelines, one should be hesitant to allow investors, sponsors, Parties, and NGOs to second-guess its determinations too easily. Moreover, to ensure the consistent application of criteria, the uniform and transparent scheme of evaluation and sufficient expertise is preferable in designing an internal appeals process.

3. Disputes Between CER Transferor and Transferees over Transfer and Bookkeeping Decision of the CDM Authorities

As with decisions whether or not to certify a project, challenges to bookkeeping decisions of the CDM authorities are similar to judicial review decisions. Such disputes will most likely involve Annex I countries and investors to whom CERs will eventually be assigned. Should the auditing function not be contracted out, some review process internal to the CDM will need to be established. It seems more probable that the bookkeeping and auditing functions under the CDM will be contracted out to private entities. CDM participants would therefore require a means of recourse against their decisions.

Since bookkeeping will occur subject to guidelines issued by the CDM authorities, a uniform accounting standard will need to be developed. In order to ensure the consistent and correct application of the accounting standards, a form of ultimate recourse to a dispute settlement mechanism internal to the CDM will be necessary. Given the likely involvement of private parties to such a dispute, a mechanism similar to the Sea-Bed Disputes Chamber, which allows standing for private parties, may be the most feasible solution.

A possible danger might be that the CDM internal dispute resolution procedure will be overburdened by numerous claims against the bookkeeping entities. Thus, a decentralized system of dispute settlement might prove more effective. Investors and host States could be required to incorporate the accounting standards in their auditing contract with bookkeeping entities. As a result,

348. See Stewart, The CDM, supra note 25, at 37.
349. See id. at 18.
350. See UNCLOS, supra note 113, art. 291.
disputes over bookkeeping decisions will become a matter of contract law, adjudicable in domestic courts. In the event that the dispute could not be resolved to the satisfaction of the Parties, they could appeal to what might be termed the Kyoto Protocol Panel. To ensure greater consistency in decisionmaking, the bookkeeping entities could also be subjected to reporting requirements or some other form of periodic review.

4. Disputes over Project Failures

a. Disputes Between Project Sponsors and Investors

Disputes between project sponsors and investors can involve either private parties or governments as project proponents. Such disputes are similar to those arising out of any international direct investment contract. However, investment contracts are also affected by the guidelines developed under the auspices of the CDM. Because projects have to be registered, CERs should be created according to guidelines that promote sustainable development. Two issues that will therefore need to be resolved are whether parties should have recourse to international dispute settlement, and how to limit the jurisdiction of a dispute settlement chamber.

International arbitration appears to be the preferred mechanism for settling these disputes. Jurisdiction of an international dispute settlement body under the CDM over any claims arising out of investment contracts seems overly broad. The ICSID mechanism shows that international dispute settlement over defaults by a State in an investment contract is only a measure of last resort. Therefore, claims of a purely contractual nature can probably be adequately dealt with through arbitration.

International private arbitration also offers various other benefits. It provides choice over neutral arbitrators, making it possible to select experts. It is expeditious and inexpensive and can now be enforced in other States. International private arbitration also allows parties choice over the governing law. Parties, therefore, can avoid submitting to the jurisdiction of a

351. See supra Part III.B.1.a.
352. See Kyoto Protocol, supra note 2, art. 12.3(a).
353. See LOWENFELD, supra note 54, at 332.
354. See New York Convention, supra note 57.
355. See generally LOWENFELD, supra note 54.
host county\textsuperscript{356} and can assign the legal risks arising out of an investment contract between themselves. In addition, submitting to the jurisdiction of an arbitral tribunal usually entails a waiver of sovereign immunity.\textsuperscript{357} One would therefore expect that international private arbitration, in most cases, will provide a satisfactory resolution to disputes in which a State as project host is a party. In the most protracted and difficult cases, submission to ICSID can provide an additional remedy for investors.

\textit{b. Disputes Between Investors, CER Holders, and Project Hosts over Frustrating a Project by Host Government}

A supplementary dispute settlement mechanism, such as ICSID, ensures that the CDM is not burdened with all disputes arising out of the contractual relationship. The comparatively small number of cases brought before ICSID strongly suggests that most international investment contracts can be satisfactorily resolved through standard private arbitration. In circumstances where conciliation has failed and arbitration is unlikely to resolve the issue, ICSID presents an attractive choice to investors because it gives standing to private parties and enables investors to avoid courts in the host State. For disputes in which a host State frustrates a CDM project through outright expropriation, an international investor-host State dispute settlement mechanism, such as ICSID or the Sea-Bed Disputes Chamber, constitutes a preferred forum. To strengthen dispute settlement under the CDM, a condition precedent for participation by non-Annex I host countries and project proponents could be the required consent to some form of binding investor-host State dispute settlement.

A number of amendments to the procedures may nevertheless be necessary. The broad definition of the jurisdiction found in ICSID should be retained to ensure that all disputes arising under an investment relationship in the CDM can be resolved. A broad definition of the term "investment" would also yield a greater body of case law and allow the tribunal to refine CDM guidelines,\textsuperscript{358} thereby reducing the uncertainty involved in making CDM investments and fostering confidence in the market.\textsuperscript{359} Thus, an increased body of case law may also

\textsuperscript{356} See id.
\textsuperscript{357} See LOWENFELD, supra note 54, at 332.
\textsuperscript{358} See generally Lopina, supra note 236.
\textsuperscript{359} See Werksman, supra note 37, at 148.
reduce risks associated with making investments in countries that might not otherwise attract investors.

It may be necessary to restrict the right of States to declare jurisdiction reservations. Broad reservations may undermine the objectives of the Kyoto Protocol if, for example, they exempted regulatory takings from the ambit of consent to the settlement of investment disputes. Ironically, as the competition between investors for investment in CDM projects increases, non-Annex I countries are better able to insert reservations because investment flows are likely to be high in spite of the investment climate that exists in non-Annex I countries. In particular, under a system of strict investor liability, reservations by developing countries can deprive investors of redress for showing that they were not at fault. In contrast to many other forms of international dispute settlement, an ICSID-like award would be binding both as a matter of international and domestic law. In light of the defects of the enforcement of ICSID awards, the deposit of a performance bond should be contemplated for the CDM.

With respect to an appeals procedure, it seems doubtful that mere procedural review would satisfy both investor and host State. Given that many decisions are likely to involve technical data and complicated fact patterns, the potential for mistake favors substantive review. Substantive review by an ad hoc body of fixed composition also ensures uniformity if parties are to retain far-reaching choice over their arbitrators in the initial proceedings. These benefits will have to be offset against the increase in cost and delays.

With some modifications, an ICSID-like procedure will likely resolve the private law-type disputes under the CDM. An ICSID-like model facilitates the swift and smooth operation of the CDM. The ICSID process can handle non-recognition of a credit by the CDM arising from host government frustration of projects, regardless of the form of liability. The integrity of the allowance trading/credit banking system will be preserved, and the CDM authorities will not be burdened with disputes arising out of investment relations which can be adequately addressed through

360. The ICSID Convention allows States to enter reservations to the jurisdiction of ICSID. See ICSID Convention, supra note 221, art. 25(4). Entering a reservation has the effect of removing certain types of disputes from the jurisdiction of an international arbitration panel such as those instituted under the auspices of ICSID.

361. See id. art. 54(1).

362. See Stewart, The CDM, supra note 25, at 14. The suggested solution could probably be adapted to the CDM as well.
ICSID.

Table 3 below summarizes potential disputes under the CDM and recommended dispute resolution procedures. Descriptions of each procedure's advantages are also listed.

### TABLE 3

**DISPUTES UNDER THE CDM AND RECOMMENDED DISPUTE RESOLUTION PROCEDURE**

<table>
<thead>
<tr>
<th>Dispute</th>
<th>Procedure</th>
<th>Advantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Challenge to standards and procedures developed; C/P-</td>
<td>Initial appeal to C/P; thereafter appeal to dispute settlement</td>
<td>(1) appeal to C/P probably swiftest &amp; most appropriate since vested w/authority to adopt guidelines, (2) internal appeals procedure ensures consistency &amp; expertise</td>
</tr>
<tr>
<td>parties, sponsors, investors, and NGOs</td>
<td>chamber established under Protocol</td>
<td></td>
</tr>
<tr>
<td>Disputes over certification and verification of CERs; registration</td>
<td>Chamber modeled on ITLOS</td>
<td></td>
</tr>
<tr>
<td>of projects: (i) Host state, sponsor, investor—certification/registration entity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(ii) Other parties, e.g., NGO or Annex I countries—certification/verification entity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(iii) possibly appeal by any of the above parties</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bookkeeping decisions, transfer of credits: Annex I country, sponsor,</td>
<td>Chamber modeled on ITLOS or WTO DSB w/ modification to allow standing for private parties</td>
<td></td>
</tr>
<tr>
<td>investor, credit transferors and transferees—bookkeeping entities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Disputes over project failures, breach of contract, expropriation,</td>
<td>Private commercial arbitration, supplemented with possible requirement</td>
<td></td>
</tr>
<tr>
<td>regulatory interference w/project: (1) investor—host State</td>
<td>of State, sponsor, investor adherence to ICSID as condition for eligibility</td>
<td></td>
</tr>
<tr>
<td>(2) investor—project proponent</td>
<td>under the CDM</td>
<td></td>
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<tr>
<td>Challenge of decision to de-accredit</td>
<td>Internal appeals procedure similar to ITLOS</td>
<td></td>
</tr>
<tr>
<td>(1) CDM-certification entity</td>
<td></td>
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**LESIONS LEARNED FROM INTERNATIONAL DISPUTE RESOLUTION MODELS**

A close examination of dispute mechanisms found under international treaties and international law provides useful information for the design of the Kyoto Protocol dispute resolution process. Some international regimes have already considered and addressed many of the same types of dispute resolution issues that are presented by Annex I trading and the
Combining innovative features of dispute settlement mechanisms found under the Montreal Protocol, GATT/WTO, UNCLOS, and ICSID, as well as traditional means of international arbitration, would allow flexibility in sanctions and provide a binding, compulsory dispute settlement body established pursuant to the FCCC and the Kyoto Protocol.

Table 4 illustrates the characteristics of various international dispute settlement mechanisms.

### TABLE 4
**DISPUTE SETTLEMENT MECHANISMS**

<table>
<thead>
<tr>
<th>Dispute Resolution Models</th>
<th>Private Entity Participation</th>
<th>Binding</th>
<th>Choice of Forum</th>
<th>Informal Dispute Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Montreal Protocol</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ICSID</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>UNCLOS</td>
<td>X (ITLOS)</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>WTO/GATT</td>
<td></td>
<td>X</td>
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<td>X</td>
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<tr>
<td>Private Int'l Arbitration</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
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#### A. Private Sector Participation

The success of the Kyoto Protocol's dispute settlement mechanism will depend upon the participation of non-State actors, including private entities, international organizations, and NGOs. With the exception of ICSID and ITLOS, most international dispute settlement mechanisms involving States or

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363. For instance, UNCLOS' International Sea-Bed Authority conducts its own mining operations (through the Enterprise), and supervises and controls those carried out by State Parties, State enterprises, and the private sector under contract with State enterprises. UNCLOS, *supra* note 113, Annex IV, arts. 12, 13. The role of the Enterprise is analogous to the potential role of the C/P Authority under the Protocol. The development of UNCLOS' deep sea-bed regime required the consideration of the following questions: (1) who should be authorized to invest in projects; (2) what is the role of the Sea-bed Authority and Enterprise, and what regime governs the composition and voting system; (3) what will be the inherent conditions of contracts for investment in projects; (4) to what extent must projects be insured and who may insure them; (5) how will profits be shared and in what proportions; and (6) who shall have access to the dispute settlement regime, under what conditions, and will its jurisdiction be exclusive.
international organizations do not allow for the participation of non-State entities. Present dispute settlement models will require expansion to address the expected inclusion of the private sector in the Kyoto Protocol. Assuming that both Articles 12 and 17 envision the participation of the private sector, any dispute settlement mechanism will need to address the resolution of disputes between and among the private sector, national governments, the C/P Authority, and NGOs participating in the trading regimes. Even though private sector accountability will be based on contractual and domestic law, questions remain as to whether the C/P Authority will be able to hold private Parties accountable for activities related to the Protocol, since such entities are not Parties to the Protocol.

One question in particular that remains unanswered is whether a GATT/WTO-like system can be adapted to provide for private sector participation. If not, private arbitration and national courts may be the appropriate fora for disputes involving private entities. On the other hand, if the GATT/WTO system can be modified, two factors will need to be addressed: (1) international reciprocity, and (2) the enforcement mechanism for national court decisions. Where dispute settlement regimes and international tribunals deny access to non-State actors, the ability of domestic courts to decide disputes under international law and to enforce their decisions domestically is particularly salient.\(^3\) Correspondingly, if the dispute mechanism provided under the FCCC/Protocol allows a process through which private entities can obtain relief, domestic courts will not be required to bear the burden of providing an adequate forum.

1. *Three-Tier Dispute Settlement System*

The solution of which dispute settlement model is most appropriate for the Kyoto Protocol regime may lie in the establishment of a three-tier system which allows for: (1) GATT/WTO-like procedures for disputes that pertain to sequestration and certification, and bookkeeping aspects of the Protocol; (2) sanctions similar to those found under the Montreal Protocol NCP for State-Party noncompliance; and (3) international arbitration or ICSID-based procedures for private party disputes concerning financial issues.

The FCCC envisions the establishment of a multilateral

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consultative process (MCP) for the "resolution of questions regarding the implementation of the Convention." The exact scope of the MCP and its interaction with dispute resolution provisions under the Kyoto Protocol has been left open. An amendment to the Kyoto Protocol could establish a compulsory dispute settlement system that would lead to the binding resolution of disputes arising under virtually all provisions of the Protocol. In order to become a Party to the Kyoto Protocol, a State would have to agree to the Protocol's dispute settlement mechanism. This dispute settlement mechanism could be used to address any disputes concerning the application of rules and procedures under the Protocol.

First, an administrative system should be established to apply C/P rules and procedures to disputes involving bookkeeping, project registration, CER certification and verification, and emissions monitoring. The administrative resolution of such disputes should be reviewed by a GATT/WTO or ITLOS-type body. Within such a system, expert review teams could serve a fact-finding function to the MCP.

Second, disputes concerning a Party's noncompliance should be resolved through the application of Montreal Protocol NCP-type procedures. To avoid a rigid application of rules, the NCP panel and Appellate Body should be required to consider each dispute on an individual basis "taking into account the cause, type, degree and frequency of noncompliance." Since the Protocol allows the MCP to be modified by such considerations, a flexible, case-by-case approach is tacitly envisioned under the Protocol. When evaluating noncompliance, the authorities should differentiate between willful noncompliance and noncompliance due to external factors, such as political or economic factors, which are beyond a Party's control.

The MCP panel could make recommendations for compliance or sanctions similar to those found under the Montreal Protocol NCP, such as financial and technical assistance, issuance of cautions, and limiting participation in aspects of the Protocol. Allowing the non-complying Party to be involved to some degree in choosing the method of sanctioning may also alleviate one of the current criticisms of the Montreal Protocol NCP. The dispute settlement provisions should allow for full reporting to all members of the Protocol, thus providing transparency and additional motivation for States to comply, or else face the stigma

365. FCCC, supra note 6, art. 13.
366. Kyoto Protocol, supra note 2, art. 18.
of noncompliance.

Third, for disputes that may arise between private parties over financial issues, particularly disputes concerning investments, and between private parties and host States, procedures found under ICSID or private international arbitration would be most suitable.

B. Unified System or Choice of Forum?

One issue to be addressed in the design of the Kyoto Protocol's dispute settlement regime is whether the regime should be unified, as under the GATT/WTO, or provide a choice of forum as established under ITLOS. Proponents of the ITLOS multiplicity approach argue that it encourages Parties to accept compulsory and binding settlement of disputes and that it promotes "a system of free competition" among the available dispute settlement fora. On the other hand, the choice of forum approach has been criticized as possibly leading to fragmentation and conflicting interpretations of international law. In this regard, the certainty with which the GATT/WTO system applies jurisdictional rules makes the unified system a better model with respect to the Kyoto Protocol.

With respect to the FCCC/Protocol, issues related to the suitability of a unified system or choice of forum should be evaluated according to the types of disputes involved. For disputes concerning a Party's noncompliance, a unified system might prevent forum shopping. In addition, a single arbitral body would be well-versed in all aspects of the Kyoto Protocol, whereas the ICJ or an independent arbitral tribunal would be unfamiliar with many Protocol nuances. While national governments may hesitate to place decisionmaking capacity in a mandated dispute settlement body, proponents of a unified system argue that the benefits of a consistent and uniform approach to dispute settlement, where all Parties are bound by a common arbitral procedure, would enhance compliance and enforcement of the Protocol. A unified system would also facilitate consistency in decisions concerning noncompliance. Similar arguments apply to

368. Id. Competition forces the various fora to develop more liberal rules. Indeed, the ICJ has recently allowed States to determine the composition of special chambers of the ICJ, rather than risk losing cases to arbitration. See id.
369. See Charney, Third Party Dispute Settlement, supra note 367, at 76.
disputes involving the C/P Authority or issues regarding certification, verification, bookkeeping, and monitoring.

On the other hand, allowing a choice of forum may encourage the peaceful settlement of disputes, particularly where non-binding methods for fact-finding and conciliation are also available. Such a system would also appeal to State notions of sovereignty, since States would have the opportunity to choose the most appropriate forum for their legal system. At the same time, the mechanism could provide for compulsory settlement of disputes where Parties cannot agree to a particular forum. Criticisms of this approach include the potential fragmentation of CDM/Protocol/FCCC law. Perhaps this could be addressed by establishing a specialty chamber with compulsory jurisdiction over technical aspects of the CDM or other trading regimes. Any interpretations of the treaty regarding these areas would only be heard by the chamber, whose members would have expertise in that area. Thus, States would have a choice of forum for most disputes, but the specialty chamber would have compulsory jurisdiction in specific, technical areas of the trading regimes.

For disputes that involve private entities, a choice of forum may be preferable. Private entities may choose to handle investment-related disputes through traditional means of international arbitration, or they may choose to go before the arbitral body established under the Protocol for its particular expertise.

C. Opportunity for Informal Dispute Resolution

As allowed under UNCLOS and GATT/WTO dispute settlement provisions, Parties should be able to invoke—at any time—conciliation and mediation upon mutual or multilateral voluntary agreement. Participants should be encouraged to settle their disputes through peaceful means when possible. Under the Montreal Protocol NCP, once the Secretariat receives information of a potential breach by a Party, the formalized dispute settlement process begins, and Parties are not directly involved in developing a resolution. Allowing the Parties to interrupt the panel process would provide an opportunity for informal dispute resolution. Moreover, the inclusion of the disputing Parties in the development of a resolution might lead to a judgment or settlement that is agreeable to the Parties and that has greater likelihood of being satisfied.
D. Standing

An interesting feature of the Montreal Protocol’s NCP is that it does not require a Party to show injury in order to bring a complaint. Instead, any Party who has “reservations regarding another Party’s implementation of its obligations under the Protocol” may initiate the noncompliance mechanism.\(^{370}\) The process is initiated on behalf of all of the Parties, providing a forum for multilateral involvement. Taking this a step further, ITLOS goes beyond State-Parties and provides standing for private entities to initiate proceedings before the Sea-Bed Disputes Chamber.

The establishment of a special panel for disputes arising between CDM investors and host countries or between private entities concerning disputes related to interpretation of the Kyoto Protocol would provide all interested CDM participants with a much needed forum for dispute resolution. In disputes that arise solely between two private entities, for example, between project investor and project proponent under the CDM, such parties would have the option to settle their disputes through private arbitration.

E. Application of International Law

The Kyoto Protocol’s dispute resolution system should allow for the consideration and application of laws outside the FCCC and Kyoto Protocol. Such sources would include international treaties, customary international law, and any national laws that have bear on the issues presented. Provisions similar to those found under UNCLOS would allow the arbitral panel to take a reasoned approach and contribute to the progression of uniform standards of international law.

CONCLUSION

The dispute resolution system to be adopted under the Protocol will have to take into account the various potential participants—Parties, including both Annex I countries and developing countries in their role as project hosts; the C/P Authorities: bookkeeping, sequestration, verification, and monitoring entities; private investors and credit holders; and NGOs. Moreover, disputes arising under the Annex I trading regime and the CDM involve different factors. The structure of

\(^{370}\) Montreal Protocol, \(supra\) note 163, Annex IV, para. 1.
the project-based CDM involves intricate project negotiations, baseline and additionality determinations, CER decisions, and a multitude of potential disputes among investors, project hosts, CER holders and transactors, and CDM entities. In addition, under the CDM, host countries of projects will have no obligation to limit or reduce their GHG emissions under the Protocol.

The previous options used under other international dispute resolution mechanisms make it clear that the Kyoto Protocol's expected inclusion of the private sector and NGOs necessitates a somewhat different approach. Such an approach could include an internal dispute settlement mechanism modeled on the WTO/GATT system, but would also provide standing for private entities and NGOs. Standing for private entities could be set forth in guidelines that would allow for participation only if the dispute concerns activities under the Protocol, and the private entities are affiliated with that dispute. Thus, disputes concerning the application of Protocol rules and procedures (validity of monitoring/bookkeeping determinations, project registration, CER certification, and verification) would be best handled within the internal dispute settlement mechanism of the Protocol. However, under the CDM, other financially related disputes between investors and project proponents might be better resolved through private international arbitration. Finally, a dispute involving a Party's noncompliance could be resolved through non-contentious procedures and sanctions similar to those found under the Montreal Protocol's NCP.

Despite these unresolved issues, the Kyoto Protocol promises to be a groundbreaking agreement in the realm of international law, as its structure leaves available an array of possibilities and participants to achieve global reductions in greenhouse gas emissions.
APPENDIX
ACRONYM GUIDE

CDM ........................................... Clean Development Mechanism
CER ............................................... Certified Emissions Reduction
COP/MOP ...... Conference of the Parties/Meeting of the Parties
C/P Authority ....................... Convention/Protocol Authority
DSB ................................................ Dispute Settlement Body
DSU ................................................. Dispute Settlement Understanding
FCCC ............... the Framework Convention on Climate Change
GHGs ................................................. Greenhouse Gases
ICJ ................................................ International Court of Justice
ICSID .................. International Centre for the Settlement of Investment Disputes
ITLOS ................ International Tribunal for the Law of the Sea
MCP .............................................. Multilateral Consultative Process
MIGA ........................ Multilateral Investment Guarantee Agency
MOP ................................................. Meeting of the Parties
NCP ............................................... Noncompliance Procedure
NGOs ........................................ Non-governmental Organization
QELROs ....................... Quantified Emission Limitation and Reduction Obligations
TEUs .............................................. Tradeable Emissions Units
WTO ................................................ World Trade Organization